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A TREATISE

ON

NEW TRIAL

AND

APPELLATE PRACTICE

PRESENTING AND ILLUSTRATING THE LAWS AND RULES OF PRACTICE IN PROCEEDINGS SUBSEQUENT TO DECISIONS BY TRIAL COURTS, INCLUDING FINAL DISPOSITION IN APPELLATE COURT, WITH SPECIAL REFERENCE TO THE CODES AND STATUTES OF CALIFORNIA, IDAHO, MONTANA, NEVADA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING, AND THE TERRITORIES OF ARIZONA AND NEW MEXICO.

IN TWO VOLUMES.

VOLUME TWO.

BY

THOMAS CARL SPELLING,

OF THE SAN FRANCISCO BAR,

Author of "Law of Private Corporations," "Trusts and Monopolies, "Extraordinary Relief," "Injunctions," etc.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1903.

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TABLE OF CONTENTS.

VOLUME TWO.

PART II.

CHAPTER 22.

STATEMENTS AND BILLS OF EXCEPTIONS.

§ 423. General view of subject—Statutory provisions—Similarity of statements to bills of exceptions.

§ 424. Uses of statements.

§ 425. When to be filed.

§ 426. Statutes as to taking steps herein mandatory—When time begins to run against movant.

§ 427. Record must show affirmatively ground for new trial or reversal—Insufficiency of evidence.

§ 428. Record must show affirmatively ground for new trial or reversal—Errors in law.

§ 429. Record must show affirmatively ground for new trial or reversal—Verdict against law.

§ 430. Record must show affirmatively ground for new trial, or reversal—Excessive damages.

§ 431. Brevity and conciseness commended.

§ 432. What must appear by statement or bill for purposes of review.

§ 433. Specifications—True office of, and necessity for.

§ 434. Sufficiency of specifications—Insufficiency of evidence.

§ 435. Sufficiency of specifications—Errors.

§ 436. Exceptions before referee—How shown.

§ 437. Whether specifications required where "decision against law."

§ 438. When action of court pertaining to amendments to be specified as error.

§ 439. Sufficiency of specification as to amount of recovery on contract.

§ 440. Proper place for specification—Must form part of statement or bill of exceptions.
§ 441. Effect of inserting notice in statement or bill.
§ 442. Authentication.
§ 443. Duty of court to settle—Not merely to sign.
§ 444. Proposal of skeleton statement permissible.
§ 445. Extensive power of trial courts over settlement of statements and bills.
§ 446. Extensive powers of trial courts over engrossment and amendment.
§ 447. Engrossment.
§ 448. Service.
§ 449. Extension of time—By stipulation.
§ 450. Extension of time—By order of court.
§ 451. Relief on motion from failure to serve or obtain extension.
§ 452. Proposal of amendments; herein of waiver of service.
§ 453. Bringing on settlement—Notice of time and place of settlement.
§ 454. Proceedings before judge or referee at settlement—Appearance and nonappearance of parties.
§ 455. Proceedings before judge or referee at settlement—Waiver of neglect.
§ 456. Proceedings before judge or referee at settlement—Objections, excuses and explanations—How made to appear.
§ 457. Mandate to compel settlement.
§ 458. Proving exceptions before supreme court.
§ 459. Effect of statutory changes.
§ 460. Incorporation of affidavits and exhibits in bills of exceptions.
§ 461. Connected use of affidavits, statements, bills of exceptions, and other files and records.

PART III.

APPELLATE PRACTICE.

CHAPTER 23.

JURISDICTION.

§ 462. Jurisdiction of supreme court conferred and limited by the constitution—Judicial, an independent department of government.

§ 463. Legislature cannot enlarge jurisdiction of courts, but may prescribe regulations.

§ 464. Necessity for definite legislative scheme, supplementing the constitution.

§ 465. Powers of supreme court as to method of procedure, in absence of legislation.

§ 466. The statutory scheme for exercise of appellate jurisdiction exclusive.

§ 467. Heads of appellate jurisdiction—Cases at law—Limitation with reference to amount involved.

§ 468. Heads of appellate jurisdiction—Cases of equitable cognizance.

§ 469. Same—Cases of equitable cognizance in justice's court.

§ 470. Heads of appellate jurisdiction—Divorce cases.

§ 471. Heads of appellate jurisdiction—Cases involving title to, or possession of, real estate.

§ 472. Heads of appellate jurisdiction—Cases involving legality of tax, impost, assessment, municipal fine.

§ 473. Heads of appellate jurisdiction—Cases of forcible entry and detainer.

§ 474. Heads of appellate jurisdiction—Actions to abate nuisances.

§ 475. Jurisdiction in action of claim and delivery—How value tested.

§ 476. Heads of appellate jurisdiction—Probate matters.

§ 477. Heads of appellate jurisdiction—Special cases.

§ 478. Heads of appellate jurisdiction—Criminal cases.

CHAPTER 24.

SUBJECTS OF APPEAL—JUDGMENTS.

§ 479. General view—Statutory provisions.
§ 480. Rule that appeal lies only from final judgment—What constitutes.
§ 481. Policy of law in requiring final judgment for purposes of appeal.
§ 482. As to what constitutes finality for purposes of appeal—Interlocutory decrees distinguished.
§ 483. Appeal lies though further order pertaining to enforcement necessary.
§ 484. How finality affected by order granting new trial as to some, and denying it as to others.
§ 485. Whether entry essential to finality—Rendition and entry distinguished.
§ 486. Right of party with respect to entry of judgment.
§ 487. Essentials of judgment.
§ 488. Judgments distinguished from orders.
§ 489. Appeals lie from certain interlocutory decrees.
§ 490. Appeal lies from void judgment.
§ 491. Appeal lies from vague and informal judgment.
§ 492. Appeal lies from default judgment.
§ 493. Appeal lies from part of judgment.
§ 494. Judgments entered pursuant to mandate of appellate court not appealable.
§ 495. Rule that consent judgments not appealable—Exception.

CHAPTER 25.

SUBJECTS OF APPEAL—ORDERS GENERALLY.

§ 496. What constitutes an order for purposes of appeal.
§ 497. Appeals from orders authorized by statute.
§ 498. Appeal only allowable from original order—Exceptions.
§ 499. Orders on motion for relief from a "proceeding."
§ 500. Same subject—Exception as to certain orders to vacate judgment.
§ 501. Orders on motions for new trial.
§ 502. Same subject—Exception in case of appealable ex parte orders.
§ 503. Orders in injunction cases.

§ 504. Orders refusing to dissolve attachment.

§ 505. Orders changing the place of trial.

§ 506. Orders in contempt cases.

§ 507. Supervisory power limited to use of prerogative writs in contempt cases.

§ 508. Right of persons not original parties, but affected by orders.

§ 509. Right of party against intruder into action.

§ 510. Appeal may be taken from void order in due form.

CHAPTER 26.

SUBJECTS OF APPEAL—ORDERS IN PROBATE.

§ 511. In probate matters—General view—Statutory provisions.

§ 512. Rule that appeal must be taken from judgment or order, and not from order on motion to vacate.

§ 513. A judgment or order against, or in favor of, directing the partition, sale, or conveyance of real property.

§ 514. Granting, refusing to grant, revoking, or refusing to revoke letters testamentary or of administration, or of guardianship.

§ 515. Order settling an account of an executor, administrator, or guardian, or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof.

§ 516. Judgment or order for the payment of a debt, or claim, or legacy, or distributive share.

CHAPTER 27.

SUBJECTS OF APPEAL—SPECIAL ORDERS AFTER FINAL JUDGMENT.

§ 517. General views—Meaning of term "special."

§ 518. As to relation of special order to the judgment.

§ 519. Orders pertaining to costs—Considered with relation to entry of judgment.

§ 520. Orders pertaining to costs—Considered with reference to amount as an element of appellate jurisdiction.

§ 521. Further illustrations.

CHAPTER 28.

PARTIES TO THE PROCEEDING.

§ 522. Statutory provisions—General rule as to parties applicable.
§ 523. Suggestion of test for determining who proper parties appellant.
§ 524. Joinder on appeal, a subject of but little importance.
§ 525. Further as to meaning of "party aggrieved."
§ 526. Same subject—Parties holding fiduciary relation.
§ 527. Further as to meaning of "party aggrieved"—Rule when judgment shows no interest.
§ 528. Right of party recovering judgment to appeal.
§ 529. Transfer of interest as affecting right of appeal.
§ 530. Appeals by persons not original parties to action.
§ 531. Parties respondent.

CHAPTER 29.

NOTICE OF APPEAL.

§ 532. Time within which appeal may be taken.
§ 533. How appeal taken—Sense in which filing and serving notice constitutes the taking of appeal—Relation to undertaking—Statutory changes.
§ 534. Form and requisites of notice.
§ 535. Signature to notice—Herein as to authority of attorney.
§ 536. On whom notice to be served.
§ 537. Meaning of "adverse party" as used in statutes.
§ 538. Further as to "adverse party"—Failure to appear—Fictitious parties.
§ 539. Filing the notice.
§ 540. When notice may be served.
§ 541. How notice served.
§ 542. Same subject—When service upon party individually sufficient.
§ 543. Rule that each prescribed step in process of appealing is jurisdictional.

CHAPTER 30.

UNDERTAKINGS ON APPEAL.

§ 544. Purpose and meaning of—Relation to stay bond.
§ 545. An undertaking must be filed unless waived.
§ 546. Time for filing—Relation to service and filing notice—Extension of time.
§ 547. Deposit in lieu of undertaking.
§ 548. Undertaking required for each appeal—Exceptions.
§ 549. Form and essential parts.
§ 550. As to what constitutes sufficient execution.
§ 551. Undertaking by surety companies.
§ 552. Dispensing with undertaking by stipulation—Waiver—Estoppel.
§ 553. Statutes dispensing with undertaking.
§ 554. Relief in appellate court from defects and omissions.

CHAPTER 31.

STAY BONDS.

§ 555. The stay of execution a proceeding collateral to and independent of the appeal.
§ 556. Undertaking on appeal and stay bond distinguished—Cases in which undertaking effects a stay.
§ 557. Stay of enforcement upon appeals from orders.
§ 558. Time for filing stay bond not limited—Relief with respect to in appellate court.
§ 559. Powers of lower court suspended after appeal taken.
§ 560. Failure to give the bond leaves lower court without power to stay execution.
§ 561. Effect of appeal upon injunctions.
§ 562. Effect of appeal upon order on motion to set aside judgment.
§ 563. Stay of waste in connection with possessory actions—Foreclosure suits.
§ 564. Where various forms of relief given by same decree.
§ 565. Effect of appeal upon lien of judgment.
§ 566. Effect of appeal upon attachment lien.

CHAPTER 32.

JUSTIFICATION OF SURETIES.

§ 567. Statutory changes.
§ 568. Effect of changing—Consequences of failure of sureties to undertaking to justify.
§ 569. Of the notice of justification—Power of court to shorten time.
§ 570. Of the proceeding to justify.
§ 571. With new sureties, new undertaking necessary.
§ 572. Waiver of justification.
§ 573. No justification by surety company required.
§ 574. Stay pending proceeding to justify.
§ 575. Power of superior court with respect to undertakings in justices' courts.

CHAPTER 33.

RECORD ON APPEAL FROM JUDGMENT GENERALLY.

§ 576. Statutory provisions and their effect.
§ 577. The judgment-roll and other papers.
§ 578. Notice of appeal as part of record—Proof of service.

CHAPTER 34.

THE VERDICT.

§ 579. Statutory changes.
§ 580. General and special verdicts distinguished.
§ 581. Inconsistency between general and special verdict.
§ 582. Verdicts in equity cases.
§ 583. Correction of verdict by the court.
§ 584. Verdict must be within the issues.
§ 585. Uncertain, informal and defective verdicts—Amendment of.
§ 586. Waiver.

CHAPTER 35.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

§ 587. Comparison of trial by court alone and trial by court and jury.

§ 588. Statutory provisions and changes—Systems of express and of implied findings distinguished.

§ 589. When findings implied under present system.

§ 590. Presumption of waiver of findings.

§ 591. Findings must respond to and dispose of the issues.

§ 592. Question may be presented as well on appeal from order on motion for new trial as on appeal from the judgment.

§ 593. The findings should be sufficiently definite and certain as not to require an investigation on review to determine what issues are decided.

§ 594. Finding upon an immaterial issue not required.

§ 595. Ultimate, rather than probative, facts should be found.

§ 596. Findings must be within the issues when compared with the pleadings.

§ 597. Findings should not be of legal conclusions, or of conclusions of mixed law and fact.

§ 598. Findings should not set forth the evidence.

§ 599. The mere misplacement of a finding of fact among the conclusions of law does not affect its character as a finding.

§ 600. How facts to be stated.

§ 601. Findings must not be contradictory.

§ 602. When findings of probative facts disregarded.

§ 603. Construction of findings.

§ 604. Agreed statement in lieu of findings.

§ 605. Findings by referee.

§ 606. Findings must be filed in proper time.

§ 607. Power of court over findings in case of mistake, misapprehension, etc.

§ 608. Power of court to amend findings.

§ 609. No findings required to support orders.

§ 610. How conclusions of law stated.

§ 611. Changing conclusions of law.

CHAPTER 36.

BILLS OF EXCEPTIONS AND STATEMENTS ON APPEAL.

§ 612. Important function of bills of exceptions as part of the record.
§ 613. Methods of preparation and uses—Relation to "statement on appeal"—Statutory changes.
§ 614. Method of settling bills at the trial.
§ 615. Further as to bills settled at the trial.
§ 616. Further as to bills settled after the trial—Preparation and uses of.
§ 617. Either the one or the other method must be pursued.
§ 618. Bills of exceptions permissible on decisions of questions of law.
§ 619. Specifications.
§ 620. Method of taking and preserving exceptions.
§ 621. Bills of exceptions as part of judgment-roll.

CHAPTER 37.

RECORD ON APPEALS FROM ORDERS.

I. INTERMEDIATE ORDERS AND SPECIAL ORDERS MADE AFTER FINAL JUDGMENT.
II. ORDERS ON MOTION FOR NEW TRIAL.

I. INTERMEDIATE ORDERS AND SPECIAL ORDERS MADE AFTER FINAL JUDGMENT.

§ 622. General view of subject.
§ 623. Statutory changes.
§ 624. Further as to bills of exceptions on appeal from orders.
§ 625. Time and manner of settling the bill under rule 29.
§ 626. Use of bills of exceptions for purposes of identification.

II. ORDERS ON MOTION FOR NEW TRIAL.

§ 627. The statutory designation of essential record on appeal.
§ 628. When additional bill of exceptions necessary.
§ 629. Statement and bill of exceptions compared.
§ 630. Extent to which statement on motion for new trial may be used on appeal from judgment.
§ 631. Identification of affidavits where motion for new trial made and heard on the minutes.
§ 632. How proceedings subsequent to hearing of motion shown.

CHAPTER 38.

TRANSCRIPT.

§ 633. General office of transcript.
§ 634. Printing transcripts.
§ 635. Arranging and indexing the transcript.
§ 636. Authentication—By stipulation.
§ 637. Authentication—By the clerk.
§ 638. What the transcript must contain.
§ 639. Shortening the transcript by abbreviation, omission, abridgment and order of supreme court.
§ 640. Each appeal to be heard on its own transcript.
§ 641. Transcripts cannot be pieced out by reference to transcripts on file in other appeals.
§ 642. Filing and serving transcripts.
§ 643. Objections to transcript.
§ 644. Procedure to correct and amend transcript.
§ 645. Surplusage in the transcript.

CHAPTER 39.

DISMISSAL OF APPEALS.

§ 646. Grounds for mostly jurisdictional—General view of the subject.
§ 647. Want of jurisdiction of subject of appeal.
§ 648. Want of jurisdiction of parties.
§ 649. Failure to file or serve transcript.
§ 650. Defectiveness of transcript as ground for dismissal.
§ 651. Dismissal for failure to serve transcript.
§ 652. Loss of interest by appellant as ground—Waiver of right to appeal.
§ 653. Dismissal of appeal prematurely taken.
§ 654. Failure of appellant to file points and authorities.
§ 655. Miscellaneous grounds for dismissal.
§ 656. Who may move for dismissal.
§ 657. Motion to dismiss—How made.
§ 658. Proper time for motion to dismiss.
§ 659. Relief from default on ground of mistake, inadvertence, etc., in response to motion to dismiss.

§ 660. When respondent estopped from asking a dismissal—And herein of waiver.

§ 661. Same subject—Construction of stipulations.

§ 662. Hearing and disposal of motion—Best evidence required—Grounds must be specified.

§ 663. Hearing and disposal of motion—Appearance need not be limited.

§ 664. Hearing and disposal of motion—When and to what extent record consulted.

§ 665. Hearing and disposal of motion—How motion based upon defective record may be met.

§ 666. Hearing and disposal of motion—What considered outside transcript—Form of presenting same.

§ 667. Hearing and disposal of motion—Use of affidavits.

§ 668. Effect of dismissal.

§ 669. Renewal of motion.

CHAPTER 40.

SCOPE OF REVIEW AND DECISION ON APPEAL.

§ 670. Limitation of discussion and illustration.

§ 671. Review limited by the record.

§ 672. Limiting review by stipulation or waiver.

§ 673. Court may consider matters not alluded to in argument.

§ 674. Decision of points not necessary to be passed upon.

§ 675. Review limited by the record—Whether points argued in lower court immaterial.

§ 676. Limitation by consent.

§ 677. Limitation by estoppel equivalent to consent.

§ 678. Limitation by rule against decision of facts.

§ 679. When rule not applicable—Review of evidence when mistake, misapprehension, passion, etc., of jury.

§ 680. Modification of general rule in certain states.

§ 681. When no substantial conflict, sufficiency, or insufficiency of evidence is a proper question for review.

§ 682. No review of facts, where decision is an inference from circumstances.

§ 683. Limitation by concession to discretion of trial court.

§ 684. Limitation resting upon presumptions in favor of judgment or order appealed from.

§ 685. Further as to presumption against error.

§ 686. Further as to presumptions on appeal and their rebuttal.
§ 687. Presumptions in cases of statements and bills of exceptions.
§ 688. Limitation by rule that matter complained of must affect a party entitled to take an appeal and actually appealing.
§ 689. Limitation by rule that judgment or order not disturbed by immaterial or nonprejudicial matter.
§ 690. Scope of investigation in cases of judgment by default.
§ 691. Limitation by "law of the case."
§ 692. Limitation resulting from doctrine of stare decisis.
§ 693. No limitation by reasoning of lower court.
§ 694. Scope of inquiry and decision cannot be enlarged by statute.
§ 695. Abortive legislative attempts to control herein.

CHAPTER 41.

GENERAL MATTERS OF PRACTICE IN APPELLATE COURT.

§ 696. Oral argument.
§ 697. Points and authorities cannot be dispensed with.
§ 698. Duty of respondent to answer points.
§ 699. Appellant should make all his points in his opening brief.
§ 700. Points should not be reserved for petition for rehearing.
§ 701. Improper matter in briefs—How dealt with.
§ 702. Moot questions not decided.
§ 703. Form of rendering decisions.
§ 704. Succession of interest after appeal taken.
§ 705. Death of party before appeal taken—Before service of notice of motion for new trial.
§ 706. Succession in office.
§ 707. Effect of bankruptcy proceedings pending appeal.
§ 708. Stipulations in supreme court.
§ 709. Suspending rules of court by stipulation.
§ 710. Motions to strike out.

CHAPTER 42.

RELIEF GIVEN ON APPEAL.

§ 711. Generally as to power over judgments and orders appealed from.
§ 712. Power exercised in great variety of forms.

§ 713. Modification in various forms.
§ 714. Where judgment final in favor of appellant ordered.
§ 715. Same subject—Evidence not made the basis of order for judgment.
§ 716. Methods and forms of direction by appellate courts—Opinion and order construed together.
§ 717. Effect of reversal of judgment upon other proceedings in same case.
§ 718. Conflicting orders in same case—Construction of same.
§ 719. Effect of direction of appellate court upon power of lower court.
§ 720. Restitution on reversal.
§ 721. Frivolous appeals—Damages for.
§ 722. Damages upon dismissal of appeal.
§ 723. Costs on appeal.
§ 724. Effect of equal division of court.

CHAPTER 43.

REHEARING, AMENDMENT, AND CORRECTION.

§ 725. Belongs to inherent powers of court—Constitutional and statutory provisions.
§ 726. Rehearing and hearing in bank distinguished.
§ 727. Proceedings for and upon rehearing and hearing in bank.
§ 728. Rehearings after decision in original proceeding.
§ 729. Motions to amend and to correct mistakes in the record.
§ 730. Modification without rehearing—Extensive meaning of latter term.
§ 731. Disqualification of justices.
§ 732. Reargument on account of equal division of court.

CHAPTER 44.

ISSUANCE AND RECALL OF REMITTITUR.

§ 733. Certifying result of appeal to lower court—Remittitur.
§ 734. Recall of remittitur.

CHAPTER 45.

APPEALS IN CRIMINAL CASES.

§ 735. Provisions governing civil cases generally applicable.
§ 736. Constitutional and statutory provisions.
§ 737. Appeals may be taken by either side.
§ 738. Of the record on appeal.
§ 739. Provisions limiting time for presenting bill of exceptions held to be merely directory.
§ 740. Presumptions arising upon the record.
§ 741. Presumption of injury from error.
§ 742. Disposal of the appeal.
§ 743. Effect of reversal on appeal by defendant.

CHAPTER 46.

APPEALS FROM JUSTICES' COURTS.

§ 744. Scope and limits of jurisdiction.
§ 745. How taken—Effect of appeal.
§ 746. Statement where appeal on question of law alone.
§ 747. Record on appeal—What constitutes—How transmitted.
§ 748. Security to respondent—Effect of failure to provide.
§ 749. Disposal of appeal in superior court.
§ 750. Supervisory power of supreme court.
§ 751. Proceedings subsequent to final order in superior court.

PART IV.

CHAPTER 47.

RELIEF AGAINST JUDGMENTS AND DECREES BY SUIT IN EQUITY.

§ 752. Distinctions and definitions.
§ 753. Mere errors and irregularities no ground for equitable relief.
§ 754. The jurisdiction purely equitable and the suit an indirect attack upon the judgment.
§ 755. Party seeking the relief must show diligence—Herein of laches.
§ 756. When a meritorious cause of action or defense must be shown.
§ 757. Must appear that party seeking relief would be benefited by a re-examination.
§ 758. Must offer to do equity.
§ 759. Rule that no relief granted upon grounds available in original suit.
§ 760. Remedy by motion or otherwise in court, where action tried, as bar.
§ 761. Concurrent remedies by motion and suit in equity further considered.
§ 762. No jurisdiction as to judgments fixing status of persons or property.
§ 763. Fraud as ground for relief.
§ 764. Further as to meaning of extrinsic fraud.
§ 765. Fraud consisting of unauthorized appearance of attorney.
§ 766. Mistake as ground for relief.
§ 767. Accident and surprise as ground for relief.
§ 768. Loss of bill of exceptions.
§ 769. Relief against void judgments.
§ 770. Further as to relief where no jurisdiction of the person.
§ 771. Relief granted for matters occurring after judgment.
§ 772. Bills of review.
§ 773. Parties to the action.
§ 774. Allegations must be specific.

PART II.

CHAPTER 22.

STATEMENTS AND BILLS OF EXCEPTIONS.

§ 423. General view of subject—Statutory provisions—Similarity of statements to bills of exceptions.

§ 424. Uses of statements.

§ 425. When to be filed.

§ 426. Statutes as to taking steps herein mandatory—When time begins to run against movant.

§ 427. Record must show affirmatively ground for new trial or reversal—Insufficiency of evidence.

§ 428. Record must show affirmatively ground for new trial or reversal—Errors in law.

§ 429. Record must show affirmatively ground for new trial or reversal—Verdict against law.

§ 430. Record must show affirmatively ground for new trial, or reversal—Excessive damages.

§ 431. Brevity and conciseness commended.

§ 432. What must appear by statement or bill for purposes of review.

§ 433. Specifications—True office of, and necessity for.

§ 434. Sufficiency of specifications—Insufficiency of evidence.

§ 435. Sufficiency of specifications—Errors.

§ 436. Exceptions before referee—How shown.

§ 437. Whether specifications required where "decision against law."

§ 438. When action of court pertaining to amendments to be specified as error.

§ 439. Sufficiency of specification as to amount of recovery on contract.

§ 440. Proper place for specification—Must form part of statement or bill of exceptions.

§ 441. Effect of inserting notice in statement or bill.

§ 442. Authentication.
§ 443. Duty of court to settle—Not merely to sign.
§ 444. Proposal of skeleton statement permissible.
§ 445. Extensive power of trial courts over settlement of statements and bills.
§ 446. Extensive powers of trial courts over engrossment and amendment.
§ 447. Engrossment.
§ 448. Service.
§ 449. Extension of time—By stipulation.
§ 450. Extension of time—By order of court.
§ 451. Relief on motion from failure to serve or obtain extension.
§ 452. Proposal of amendments; herein of waiver of service.
§ 453. Bringing on settlement—Notice of time and place of settlement.
§ 454. Proceedings before judge or referee at settlement—Appearance and nonappearance of parties.
§ 455. Proceedings before judge or referee at settlement—Waiver of neglect.
§ 456. Proceedings before judge or referee at settlement—Objections, excuses and explanations—How made to appear.
§ 457. Mandate to compel settlement.
§ 458. Proving exceptions before supreme court.
§ 459. Effect of statutory changes.
§ 460. Incorporation of affidavits and exhibits in bills of exceptions.
§ 461. Connected use of affidavits, statements, bills of exceptions, and other files and records.

§ 423. General view of subject—Statutory provisions—Similarity of statements to bills of exceptions.

The things done and steps taken, from the preparation of the original draft to the final act of filing the engrossed authenticated bill of exceptions or statement, constitute a "proceeding" as that term is used in codes and practice acts.[1] This consideration and that of their great importance in all statutory schemes for the correction of error, fully justify their distinct, separate and elaborate discussion in a work of this character.

1 Stonesifer v. Kilburn, 94 Cal. 33, 43, 29 Pac. 332, and cases cited.

Aside from certain technical and trivial differences in the uses of bills of exceptions and statements, they are the same. They are proposed, served, settled and authenticated in the same way and the general purposes are the same—that is to say, the preservation, for purposes of review, of those matters which, without them, would not be available. In Kelly v. Ning Yung etc. Assn.,[2] the court said that the settlement of a statement resulted in a product differing from a bill of exceptions only in the "label" which it bears. Their importance demands thorough and painstaking consideration; and they may be most conveniently and intelligently considered together, without reference to useless consumption of space which a separate treatment would involve.

It has been seen that the giving of notice of intention is by no means as simple a matter as it appears upon first impression, especially where the notice is of an intention to move on the minutes requiring particular specifications of errors of law and insufficiency of evidence which there is no opportunity afforded to amend in any material part. But the questions which there arise are few and simple compared with those which may arise where the next move following the notice is reached. Where the movant decides to make his motion on a completed record, neither requiring nor admitting of further verification or amendment, he designates in his notice as the moving paper either a bill of exceptions or statement, or affidavits, or both; but he cannot also designate the minutes. If he conclude that the exigencies or condition of the case renders the minutes of the court preferable as the basic evidence of his right to a new trial, he designates that, and may also designate affidavits.

There have been several judicial attempts to distinguish between bills of exception and statements and several declarations by the supreme court that there is practically no difference between them. In Witter v. Andrews,[3] the court said: "Plaintiff presented for settlement what he termed 'a proposed statement on appeal.' The code makes no provision for the settlement

2 138 Cal. 603, 72 Pac. 148.

3 122 Cal. 1, 2, 54 Pac. 276.

of a statement on appeal, and, as he did not serve a notice of motion for a new trial, he is not entitled to have 'a statement of the case' to be used on an appeal from the judgment. But he was entitled to a bill of exceptions, and, as there is no substantial difference between a statement and a bill of exceptions, he should not be deprived of the fruits of his appeal, because he called the document presented a statement, rather than a bill of exceptions." And in People v. Crane,[4] which was an application for a writ of mandate, the court said: "The relator did not serve a notice of motion for a new trial, and therefore is not entitled to have 'a statement of the case,' to be used on a motion for a new trial settled. And it appears that he did not prepare 'a statement of the case' for that purpose. But he did prepare something which he entitled 'Plaintiff's proposed statement on appeal,' for which the code makes no provision. And for that reason the respondent, as judge of the superior court in which the original action was tried, refused to settle it. The objection, however, as we view it, is rather to the form than to the substance of the thing. If it had been entitled 'Plaintiff's bill of exceptions,' we think it clearly would have been the duty of the court to settle it. The exception appears to the decision, upon the ground of the insufficiency of the evidence to justify it, and the objection specifies the particulars in which such evidence is alleged to be insufficient. Whether more of the evidence is stated with the objection than is necessary to explain it is a question which must be determined by the judge when he settles it. If more than is necessary for that purpose has been inserted, it is his duty to strike out so much as is unnecessary. But we do not think that a mistake in entitling a bill of exceptions is a sufficient ground for refusing to settle it. . . . . But the code makes a distinction, by providing that one may be settled within a certain time after the entry of the judgment and the other within a specified time after the service of a notice of a motion for a new trial. In this case the exception, with so much of the evidence as the relator claims is necessary to explain the objection, was presented to the judge for settlement within

4 60 Cal. 279. To same effect, People v. Lee, 14 Cal. 510.

the time prescribed by the code for the presentation of a bill of exceptions, and we think that it should have been treated as such notwithstanding the mistake in entitling it." The learned men who prepared the Code of Civil Procedure of California appear to have realized this substantial identity, but saw fit to preserve the use of both names. The provisions which they made, however, were such as to forbid any really different meaning being attached to statements and bills of exception. The code provides that "any statement used on motion for a new trial . . . . or any bill of exceptions settled as provided in sections 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial."[5] To entitle the statement to be used upon appeal from the judgment, it must, theoretically at least, have been used on the motion for new trial. But to entitle the party to use the bill or statement which he has used on the motion, he is not required to appeal from the order made by the court on the motion.[6] In Jue Fook Sam v. Lord[7] the court said: "The letter and spirit of the code provisions unite in showing that it was the aim of the legislature to require a party desiring to review a decision of the trial court on matters of fact, or its rulings at the trial, to take some steps to correct the error while the history of the trial is fresh in the memory of the judge and the parties. If the aggrieved party desires the court which tried the case to review its own decisions of law or of fact, and grant a new trial, he 'must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, ... file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds,' etc.; and thereafter he must prepare and serve his bill or statement within the time fixed. Any such bill or statement used on motion for a new trial may be used on appeal from a final judgment, although there has been no appeal from the order, if it appear from the certificate of the judge, or otherwise, that it was used

5 Cal. Code Civ. Proc., § 950.

6 Whalen v. Harrison, 26 Mont. 316, 67 Pac. 934.

7 83 Cal. 159, 23 Pac. 225.

on the hearing of the motion. If the proper steps have not been taken in time, and for that reason the judge has refused to settle the bill or statement, it is not one which has been used on a motion for a new trial, and cannot, therefore, be used on appeal from the judgment." The latest exposition of the law as to unsettled bills of exceptions and statements, with reference to their potential use on appeal from the judgment is found in Kelly v. Ning Yung etc. Assn,[8] where the court in bank held that upon motion to dismiss, if nothing appeared to the contrary, it would be presumed that the bill or statement, when settled, would be used on the motion for new trial. While the courts have thus in some cases placed emphasis upon the code provision as to the use of the statement, or bill, on the motion, they have in others demonstrated that such use is little more than a fiction.[9] The above-quoted part of the

8 138 Cal. 603, 72 Pac. 148. The chief justice delivering the opinion said: "One of the contentions of the respondent is, that the statement to be settled in this case cannot be used in support of the appeal from the judgment because it has not been 'used' in support of the motion for a new trial. There does not seem to be any good reason for giving literal effect to the word 'used' as employed in the provision quoted. When a statement on motion for a new trial has been duly settled it is conclusively presumed to show exactly what occurred at the trial, including the exceptions reserved to the rulings of the court upon questions of law. As to these matters, it is in substance the same thing as a bill of exceptions, the only difference between the two being the difference in their labels. This being so, it is difficult to perceive why, if the statement contains exceptions to rulings which may be reviewed on appeal from the judgment, it should not be used in support of such appeal, whether or not it has been 'used' on the motion for a new trial and regardless of the question whether it is likely ever to be so used. But the present case does not call for a decision of this point; and conceding, without deciding, that a statement settled in pursuance of a motion for a new trial must be actually used in support of the motion before it is available in support of an appeal from the judgment, it still does not follow that the statement in question may not be used in support of this appeal. When it is settled, the motion for a new trial will be ripe for hearing, and if the right of the appellant to use the statement in support of his appeal depends upon using it in support of the motion, it is to be presumed that he will so use it long before the appeal can be brought to a hearing in this court."

9 In Schneider v. Market St. Ry. Co., 134 Cal. 482, 484, 66 Pac. 734, it is said that "When specifications are set out in the state-

opinion in Jue Fook Sam v. Lord contains some emphatic language, evidently resulting from an oversight of the fact that prior to the time of the hearing of the motion the court has lost power to certify to the statement. In fact, no method is provided by which it can be made to appear that such statement was or was not used at the hearing of the motion. Moreover, what the learned justice said on the point, about it appearing "from the certificate of the judge or otherwise, that it was used on the hearing of the motion," was very clearly a mere dictum. In that case the proceeding to settle the statement had lapsed for failure to serve and present it in time, and the trial judge had refused to settle it. Having decided that point, there was nothing more to decide. There was no certificate of the judge in the case. The true test is whether the statement is served, settled, engrossed and filed according to law, and whether a decision was made on the motion for a new trial. All else will be presumed as to the use of the statement on the motion. Many cases have been decided with this understanding without any question being raised.

The same court holds that where a party, in his notice of motion for a new trial, states that it will be "made upon a statement of the case," and is heard without objection upon what is denominated a "bill of exceptions," that it is merely an irregularity, which must be disregarded.[10]

There is, in fact, no difference in the methods to be pursued to prepare a bill of exceptions and a statement respectively, nor in the purpose served by them when completed; but when errors are relied on upon review, where a statement is used upon motion for new trial, there must be a separate specification of errors, as well as insufficiency of evidence to support the decision, if such insufficiency be also relied on, whereas, if a bill of exceptions be used, whether on appeal or on motion for new trial, no specification of errors, other than the notations of exceptions occurring throughout the bill, is required. After

ment, it will be presumed, without a formal statement to that effect; that they were contained in the notice and that they were in fact argued." This dispenses with any showing as to use of the statement on the motion.

10 Dyer v. Placer County, 90 Cal. 277, 27 Pac. 197.

various refusals to consider alleged errors, and distinct enunciations that such specification was required, the court, in Smith v. Smith,[11] came to the conclusion above stated.

Bills of exceptions and statements have been assimilated in form and meaning by the broadening of the meaning of the term "exception." The primary office of an exception was to call the attention of, or give notice to, the court that the party found fault with, or considered to be erroneous, some act or ruling of the court in any proceeding before it, during the trial, and always presupposed the presence of the excepting party in court at the time.[12] The direct purpose of an exception was to afford an opportunity for correction of the asserted error, if the court upon reconsideration became convinced that there was error. But by the code,[13] the meaning of the term is so extended as to embrace any act by the court upon which an objection may be made and a review had, whether it be in the presence of the party or in his absence.

In the California Statutes of 1851, the matters which might be excepted to must have occurred at the trial, but section 646 of the Code of Civil Procedure defines an exception as follows: "An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section 647." Section 647 reads as follows: "The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to." It will be seen upon reading other sections of the code, in connection with these two, that the bill of exceptions which a party

11 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

12 See Cal. Comp. Laws (Garfielde & Snyder, 1853), p. 553.

13 Cal. Code Civ. Proc., § 646 et seq.

seeking a review is authorized to prepare and use may contain all that could be embodied in a statement. By a comparison of the provisions on the general subject of exceptions with those contained in the sections govening new trials, it will be seen that the preparation of a bill of exceptions is conducted in the same way and subject to the same rules, whether it be for use on appeal or on motion for new trial. By a series of amendments, having in view this uniformity of method and use, such uniformity has been attained.

Only one distinguishing feature between bills of exceptions and statements has been preserved. While no specification of errors need be inserted in the record on appeal from the judgment nor in the record on motion for new trial where a bill of exceptions is used, such specification is still required in statements used on the motion. There is no more reason for this requirement where the same paper is called a statement than where it is called a bill, but such distinction is still observed and enforced.[14]

But such reason for the decision in the case of Smith v. Smith appears to be entirely inconsistent with the several preceding decisions recognizing a substantial identity between the two documents bearing different designations. The court will, no doubt, at the first opportunity, harmonize its decisions by dispensing with specifications of errors of law in statements on motion for new trial. That being done, there will remain no vestige of difference between either the form, substance, or purpose of a statement and bill of exceptions.

14 Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. In this case, McFarland, delivering the opinion, after hearing in bank, and referring to the opinion in deportment, said: "After further consideration, we are satisfied with the conclusion there reached, and with the opinion then delivered as to the points therein discussed. But the appeal was inadvertently considered as though the motion for a new trial had been based upon a statement of the case, and certain rulings as to the admissibility of evidence were not considered because not included in the specifications of errors. As a fact, however, the part of the transcript which contains the evidence and rulings, although substantially a statement, is designated as 'a bill of exceptions,' and in such case, under the code and former decisions, no specifications of errors of law are required. When this inadvertence was called to the attention of the court by the appel-

It is not to be overlooked that whether the paper be a bill of exceptions on appeal, a bill of exceptions on motion for new trial, or a statement, if it be claimed that the decision is not supported by the evidence, it must contain a specification of the particulars of insufficiency.[15]

Without entering here into a serious discussion of the record to be prepared after disposal of a motion made upon the minutes, it should be stated that no bill of exceptions is authorized in that case, and a specification both of particulars of insufficiency, and (according to the distinction in Smith v. Smith) of errors in law is required.[16] But under the California Code of Civil Procedure, statements prepared and settled after the decision on the motion for new trial may likewise be used on appeal from the judgment. It is expressly so provided by section 950.

The specifications of errors and of insufficiency which were contained in the notice, and which were argued before the court, and none others, should be embodied in the statement so prepared.[17] Most of the confusion and misunderstanding, and some inconsistent decisions, have resulted from consulting and endeavoring to harmonize with the Code of Civil Procedure, and decisions adhering to it, decisions rendered under the old Practice Act of 1851, and amendments thereto. That act provided for statements on motion for a new trial, and the latter could not be used in place of the former in the absence of a stipulation. The Code of Civil Procedure originally did not provide for statements at all, but amendments were made in 1874, restoring statements on motion for new trial, and providing that they might be used on appeal from the judgment, if used on the motion. No good reason has ever been assigned for the amendment, its effect being, as explained above, to provide two names for the same thing, whereas previously it had but one name.

lant, in a petition for a hearing in bank, the petition was granted. Counsel for appellant were, therefore, not in fault in not specifying the alleged errors."

15 Post, §§ 433-435, 437-440.

16 For further discussion of record where motion is made on the minutes, see ante, § 392, post, §§ 461, 630.

17 Cal. Code Civ. Proc., § 661.

The decisions under the Practice Act, as amended from time to time, are often useful on questions of construction; but in resorting to them the changes wrought by the code, as amended in 1874, in the respects hereinbefore stated, should not be overlooked.

§ 424. Uses of statements.

The decisions, following the mandatory form of statutory expression, fully establish that compliance with the prescribed conditions, in preparation for the hearing on the motion, are indispensable; in other words, when it is provided that a party may be heard upon a bill of exceptions, or a statement, prepared, served, filed and presented "as hereinafter" or "as herein" provided, or upon affidavits, he may prepare, serve, file, present and use the prepared paper, with or without affidavits; but in doing so he must closely observe the statutory methods, because they are almost without a break in the uniformity of the decisions, declared to be jurisdictional.[18]

In California and some other code states, the statement need be only served, and need not be filed until after settlement and engrossment.[19]

When, however, it is said that the perfection and use of a statement, under statutory heads requiring a statement, is a jurisdictional matter, it is not necessarily meant that the court is bound to actually use or even examine the statement in

18 See Burton v. Todd, 68 Cal. 485, 9 Pac. 663; Paulson v. Haskins, 55 Cal 468; Willis v. Kong, 70 Cal. 548, 11 Pac. 780; Hoehnan v. New York Dry Goods Co. (Idaho), 67 Pac. 796; Steven v. Northwestern Stage Co., 1 Idaho 604; Wood v. Glein, 19 Mont. 22, 47 Pac. 5; Brown v. Board Commrs., 15 Mont. 244, 38 Pac. 1072; Code Civ. Proc. Mont., § 297; State v. Cheney, 24 Nev. 222, 52 Pac. 12; Chaffee v. Sprague, 15 R. I. 135; ante, § 25, post, § 426. For law in South Dakota as to statements, bills, exceptions, specifications etc., see Parrott v. City of Hot Springs, 9 S. Dak. 202, 68 N. W. 329. As there can be no new trial of issues submitted to a jury in an equity case, of course no statement is necessary upon return of their verdict. It seems, however, to have been necessary to so decide in one case—Purcell v. McKune, 14 Cal. 230. The first case above expressly overrules certain dicta in Brichman v. Ross, 67 Cal. 601, 8 Pac. 316, with reference to the power of the court to extend time.

19 See next section.

passing upon the motion, or even that any party is under any legal compulsion to use it, or refer to it. The decisions go even further and declare that having complied with the conditions thus prescribed, having prepared, settled, engrossed and filed the statement, the motion may be taken up and disposed of at the request of either party; that though it is but fair that the opposite party be notified, yet it is not a legal requirement; that whether notified or not he may fail to attend the hearing without an abandonment of the motion or a waiver of opposition to it being imputed to him.[20] In fact, the code appears to contemplate an entire severance of all relation between the proceeding for new trial and the statement at the point of its filing, and simply intends that the statement perfected before, like that perfected after the disposal of the motion, shall constitute a reliable record for the purposes of appeal, with only slight regard for the incidental convenience of the court and parties at the hearing. It omits any requirement as to notice of the hearing, and expressly provides that "the application for a new trial shall be heard at the earliest practicable period after the notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases after the bill of exceptions, or statement, as the case may be, is filed, and may be brought to a hearing upon motion of either party."[21]

In construing the Nevada statutes, which are the same herein as those of California, the ideas here indifferently expressed were given able and learned exposition in State v. Central Pac. R. Co.,[22] as follows: "Before examining the assignment of errors contained in the statement, certain preliminary objections to the consideration of the record are made by the respondent, and these will be disposed of first. These objections are founded upon the failure of the defendant to appear at the hearing of the motion for a new trial, and its failure to except to the order of the court denying the motion. It is contended that such failure to appear operated as an abandonment of the motion. The case was tried on the sixth day of March,

20 Carder v. Baxter, 28 Cal. 99; State v. Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

21 Cal. Code Civ. Proc., § 660.

22 17 Nev. 259, 266, 30 Pac. 887.

1882. The statement on motion for new trial was filed on the sixth day of April following, and upon the twenty-ninth day of the same month, the clerk of the court appended his certificate to the effect that no amendments had been filed. Thereafter, and on the first day of May succeeding, the motion for a new trial was, at the instance of the attorney for the state, taken up and overruled by the court. These facts, of themselves, certainly show no intention on the part of the appellant to abandon its motion. But, from the fact that the motion was based upon errors in law and insufficiency of evidence, and that defendant made and filed its statement without delay, it would seem that defendant desired a pro forma ruling of the district court upon the questions which arose upon the trial, in order to perfect a record by which those questions could be reviewed by this court. It is a matter of frequent occurrence in the practice before the district courts of this state to formally submit, without argument, motions for new trial, based upon questions of law which have been discussed upon the trial. It is, of course, unnecessary to reargue matters upon which the court is fully advised, and upon which its mind is concluded."

The statement appears to have only one essential relation to the hearing of the motion; it is a measure of the power of, and limits the scope of inquiry by, the trial judge in passing upon it, as it does that of the appellate court in reviewing his order.[23]

Under the California Code of Civil Procedure, the party having elected to move on a statement,[24] and having projected the proceeding with that purpose expressed in the notice, is bound by that election, and unless a statement be perfected for use at the hearing, the court applies a conclusive presumption that he has abandoned, or "waived," the motion.[25] Even where

23 See California Code of Civil Procedure, subdivision 3 of section 659, requiring specifications in the statement, and providing that "if no such specifications be made, the statement shall be disregarded on the hearing of the motion."

24 The terms "statement" and "bill of exceptions" are hereinafter used interchangeably.

25 Campbell v. Jones, 41 Cal. 515; Waggenheim v. Hook, 35 Cal. 216; Chase v. Evoy, 58 Cal. 348, 352; Thompson v. Lynch, 43 Cal. 482; People v. Center, 61 Cal. 194; Cooney v. Furlong, 66 Cal. 522, 6 Pac. 388; Jones v. Wiley, 1 Wash. Ter. 603.

attorneys of both parties appear in open court, and, by consent, argue a motion for a new trial, this consent, even if it is a waiver of a notice of intention to move for a new trial, is not a waiver of a statement in some proper form of the grounds of the motion.[26] And without a settlement of a statement on motion for a new trial, and authentication of the same in the court below, there is no case upon which the supreme court can act.[27] In People v. Center (a civil action)[28] the court said: "When a party gives notice of his intention to move for a new trial, and fails to prosecute his motion in the court below, in consequence of which his motion is dismissed or denied, he cannot be heard to complain of the order on appeal; on an appeal from such an order, in the absence from the record of an engrossed statement on motion for a new trial, signed and certified by the judge of the court, there are no questions of fact to be reviewed."

Attempts have been sometimes made to use affidavits and other substitutes for the statement required by law. All such attempts have proved futile.[29] Nor will affidavits presented to show upon what grounds or in what manner the trial court acted in ruling upon the motion be considered.

Affidavits made subsequently to the denial of a motion for new trial, setting forth that the motion was arbitrarily denied without hearing or considering the grounds presented and urged in support thereof, form no part of the record upon appeal from the order and cannot be considered upon such appeal, the real and only question being, Did the court err?[30]

26 Walls v. Preston, 25 Cal. 61.

27 Cosgrove v. Johnson, 30 Cal. 509; Lockey v. Horsky, 4 Mont. 457, 2 Pac. 19; State v. Sadler, 21 Nev. 13, 23 Pac. 799. This rule is not changed by the fact that the judge that passed upon the motion for new trial did not preside at the trial of the case: Welland v. Williams, 21 Nev. 230, 29 Pac. 403.

28 61 Cal. 194.

29 See Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

30 Williams v. Harter, 121 Cal. 47, 52, 53 Pac. 405. In this case the court said: "The point is made that the judge of the court below, before whom the motion for new trial was heard, arbitrarily denied the motion without hearing or considering the grounds presented and urged in support thereof. To sustain this

The refusal to consider matters dehors the statement is based upon reasons which bespeak the true purpose of a statement, namely, to bring into the record those matters only which arise in the progress of the trial and constitute the basis of the motion, upon any or all the grounds which may be presented upon a statement.[31] Such is the definition of the office of the statement in the words of the supreme court, but it is submitted that, since exceptions are preserved by the terms of the statute[32] to many orders and rulings made prior to the trial, and in the absence of the party, and since the court has repeatedly decided that the statement and the bill of exceptions do not differ materially in substance or function,[33] it would be more proper to employ in lieu of the words "in the progress of the trial," the words, "prior to the verdict" or other decision.

But here one is confronted with section 658 of the Code of Civil Procedure which positively requires motions based upon the first ground, which includes rulings on applications for continuance, to amend the pleadings, and the like, to be presented on affidavits. It is utterly impossible to reconcile the decisions on this particular phase of the subject with each other, or with the statute; and legislative interference is in order. The Washington Code of Civil Procedure[34] presents peculiarities which with the construction thereof by the supreme court of that state it is impracticable and unnecessary to point out here in detail. A chief feature is that no statement or bill of exceptions on the motion is provided for. The motion

point two affidavits, made ten days after the motion was denied, are printed in the transcript, and there is also found there a counter-affidavit made still later. These affidavits form no part of the record and cannot be considered. If the defendants desired to have the matter brought before this court for review, they should at the time have excepted to the action of the court and had the facts embodied and settled in a bill of exceptions. Besides, the real and only question is, Did the court err in denying the motion?"

31 See Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Harper v. Minor, 27 Cal. 107.

32 Cal. Code Civ. Proc., § 647.

33 See ante, § 423.

34 See §§ 5072-5076 of Ballinger's Codes and Statutes; Littlejohn v. Miller, 5 Wash. 399, 402, 31 Pac. 758, decided prior to the code, but still applicable.

states the grounds generally and accompanies the notice. No specifications other or different than the grounds as designated in the statute need be inserted.

§ 425. When to be filed.

The California Practice Act of 1851 required the draft of a proposed statement to be filed, but made no provision for its service upon the adverse party. Under its said provision the filing of the statement was as strictly essential to the validity of the proceeding[35] as is service under the code, which requires that it shall be served but makes no provision for filing it prior to engrossment. Under this latter and similar statutes filing the proposed statement is not necessary, but service within legal time is essential.[36] But it was held under the Practice Act, where it appeared from the bill of exceptions signed by the judges that the motion for a new trial was heard on a statement, counter-statement and affidavits, that it could not be subsequently objected that the statement was not filed.[37] And in keeping with such decision it was held in a later case prior to the code that the filing of the engrossed statement might be

35 LeRoy v. Rassette, 32 Cal. 171; Wing v. Owens, 9 Cal. 247; Hill v. White, 2 Cal. 306; Hegeler v. Henckell, 27 Cal. 491; O'Neal v. Daugherty, 47 Cal. 164; Elder v. Feevert, 18 Nev. 278, 3 Pac. 237; Golden Fleece Co. v. Cable Co., 15 Nev. 450; Harrison v. Lockwood, 14 Nev. 263; Williams v. Rice, 13 Nev. 234; Robinson v. Benson, 19 Nev. 331, 10 Pac. 441.

36 Cal. Code Civ. Proc., § 659, subd. 3; Elliott v. Whitmore, 10 Utah, 253, 37 Pac. 463; Plano Mfg. Co. v. Jones, 8 N. Dak. 315, 79 N. W. 338. Delay in filing a bill of exceptions for more than six months after its allowance by the judge will not authorize the supreme court to disregard it, provided it be properly certified as a part of the record: Reay v. Butler, 69 Cal. 572, 577, 11 Pac. 463. In this case the court said: "But it nowhere appears that the bill was not presented in time, and the regular steps taken for its settlement. The settlement may have been postponed by the order of the judge. It must appear to this court from the record that the regular steps were not taken for the settlement of the bill. Unless this appears, we are bound to presume the bill was regularly settled. A mere objection to such settlement, in the absence of the showing above stated, does not authorize this court to disregard the bill."

37 Williams v. Gregory, 9 Cal. 76.

waived by stipulation.[38] The subject was fully considered, however, in Mills v. Dearborn,[39] where it was held that the statute was mandatory and its requirement that the engrossed statement "shall then be filed with the clerk" could not be dispensed with. If, however, through inadvertence or otherwise, the statement is filed before it is settled, it need not be again filed after settlement,[40] though no doubt the safer and more convenient practice would be to refile it.[41]

38 Thompson v. Connolly, 43 Cal. 636. In this case the court said: "The action of the court in overruling the defendants' motion for a new trial before the statement was engrossed, and the engrossed statement agreed to, or certified as correct, would have been error in the absence of any stipulation between the parties. But the stipulation of November 5, 1869, was not only a direct waiver of the engrossment before the hearing of the motion, but rendered certain the matters which the engrossed statement should contain. It is not necessary to consider what would have been the effect of the omission to engross the statement before the hearing of the motion for a new trial, upon an appeal from the order denying the motion. It is sufficient to say that a party will not be heard to complain of an error which was the result of his deliberate and formal consent."

39 82 Cal. 51, 22 Pac. 1114; Mix v. San Diego etc. R. R. Co., 86 Cal. 235, 24 Pac. 1027; Cal. Code Civ. Proc., subd. 3, § 659. The engrossed statement cannot be considered as part of the record unless, nor until, it is filed: Biagi v. Hower, 66 Cal. 469, 6 Pac. 100. A peculiarity of the Nevada statute (Rev. Stats., § 3292), must be noted. It retains the requirement found in the earlier California statute that the statement, like the notice of intention, shall be both served and filed in the first instance. This requirement is strictly enforced. See Elder v. Feevert, 18 Nev. 278, 3 Pac. 237; Golden Fleece Co. v. Cable Con. Co., 15 Nev. 450; Robinson v. Benson, 19 Nev. 331, 10 Pac. 441; Harrison v. Lockwood, 14 Nev. 263.

40 Gately v. Irvine, 51 Cal. 172; Sall v. Graves, 14 Mont. 341, 36 Pac. 354. In the first case the court disposed of the objection in these simple words: "The statement was filed and settled, which is the equivalent of 'settled and filed.'" In the second case the court said: "Respondent moves this court to eliminate from record the statement on motion for new trial: 1. Because the statement was not filed after the same was settled and allowed by the judge who tried the action. The motion cannot be sustained on this ground, because it appears from the statement that the same was filed with the clerk immediately after being prepared and served. Thereupon respondent filed amendments, and thereafter, as the record shows, the court, with both counsel present, and after their arguments, 'settled said statement on motion for new trial, as being full and cor-

In some states the filing is required to precede service as under the California Practice Act of 1851. Such statutes are held mandatory.[42]

rect, and duly signed the certificate in accordance therewith.' While the record does not show that the statement was refiled with the clerk after being settled it does show the filing of the statement and amendments with the clerk before the statement was settled and afterward the motion for new trial was heard thereon. The statement on motion for new trial should be filed after settlement. Code Civ. Proc., § 298, subd. 3. But in this case the statement was filed before it was settled, and the tendency of all the proceedings show that it remained with the clerk, as a file of the court, from the time it was first filed until it was settled, and the motion for new trial heard thereon, and still remains as such file. Under such state of facts, all the point amounts to is that the statement was filed before instead of after settlement, and this irregularity we think insufficient, as ground for striking out the statement."

41 Jackson v. Puget Sound L. Co., 115 Cal. 632, 47 Pac. 603. In this case the court said: "The defendant had done all that the law required him to do, and was entitled to have his bill of exceptions certified; for otherwise it could not avail him in this court. The statute, it is true, directs that the bill shall be filed after it is signed by the judge or referee, with his certificate that it is allowed (Code Civ. Proc., § 650); but it is not to be concluded from this provision that if the settled and engrossed bill of exceptions happens to be filed with the clerk, by inadvertence of the judge or referee, or even of the party seeking its allowance, before it has been properly certified, the right to a proper certificate is forever lost. On the contrary it ought to be considered that such a filing is premature and unauthorized, and, if a timely request is made for the certificate of allowance, it should be granted and the bill refiled. There is nothing in the statute which conflicts with this most reasonable conclusion, nor is anything to the contrary decided in Keller v. Lewis, 56 Cal. 469, or Adams v. Dohrmann, 63 Cal. 419."

42 See Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374; Boyle v. Great Northern Ry. Co., 13 Wash. 383, 43 Pac. 344. In the first case Hadley, J., delivering the opinion said: "Respondent moves to strike the statement of facts for the reason that the statement was not filed until the seventh day of March, 1901, whereas the judgment appealed from was filed for record on the ninth day of October, 1900. It is urged that the statement was filed after the expiration of the limit allowed by law, as provided by section 5062, Ballinger's Code. The motion is well taken and must be granted. The utmost limit of time within which a statement can be filed is ninety days after the time begins to run within which an appeal may be taken. If filed after thirty days, it must be done

Where there are terms of court there should be a separate bill of exceptions signed and sealed by the judge at the term, or within the time fixed, and filed as of the term to which it

by authority of an order of the court extending the time; but such time cannot be extended, in any event, beyond the ninety day period provided by statute. See State v. Seaton, 26 Wash. 305, 66 Pac. 397." In the second case it was held that the filing of the statement on the same day but after service did not obviate the objection that it was not filed in time. The policy and proper construction of such statutes was gone into fully as follows: "The motion of respondent to strike the statement of facts from the record was granted at the hearing, and the argument upon the merits confined to questions arising upon the pleadings. Two reasons were assigned why said motion should be granted—(1) that a copy of the proposed statement of facts had not been served upon the respondent after it was filed in the cause; and (2) that no notice of such filing had been served upon one of the parties who had appeared in the action. It appeared from the transcript that a copy of the proposed statement of facts was served on the thirty-first day of May, 1895, at 2:20 P. M., and that such proposed statement was filed in the cause on the same day at 3:30 P. M. It was held in this court in Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241 that the service of the copy of the proposed statement could not properly be made until after the original had been filed in the cause, and that service of such copy before the filing of the original was ineffectual; and numerous decisions of the supreme court of California upon this statute, from which ours was taken, were cited in support of the decision. In adopting the construction of the statute in the state from which it was taken, this court followed a well-settled rule of decision. Beside, the plain language of the statute indicates that the paper to be served should be a copy of a paper then on file and a part of the record of the cause. Upon the argument of this motion it was sought to distinguish this case from the one above cited, for the reason that it appeared that the statement in the case at bar was filed on the same day that it was served, while in the other case such fact did not appear, and it was contended that the decisions of the California courts were to the effect that where the service was upon the same day that the proposed statement was filed it was sufficient. We have carefully examined the California cases and have been unable to so interpret them. It is true that it is stated in some of them that a service made at the time of the filing is sufficient, but it is nowhere stated that such service would be at the time by reason of the fact that it was upon the same day. The general rule that the law will not take notice of fractions of days was not referred to in any of such decisions, and in our opinion it was not the intention of the supreme court of that state to apply it in determining what service

properly belongs; but a bill of exceptions may embody the proceedings in a cause at different terms, and, if perfected within the time fixed by the court, will be considered.[43] Delivery to the clerk for the purpose of filing and payment of any fee required by law constitutes filing. A party cannot be deprived of a legal right pertaining to the bill by reason of the failure of the court or clerk to perform a duty.[44]

§ 426. Statutes as to taking steps herein mandatory—When time begins to run against movant.

The code provision with reference to the time within which the statement must be prepared and served is so clear and explicit as not to admit of doubt. "If the motion is to be made upon a statement of the case, the moving party must, within

was simultaneous with the filing. What was said in the case above cited was, we think, justified by the cases from California. If the statute were to be construed independently of the construction placed upon it in California, one of two conclusions would necessarily follow: either that it is mandatory and must be construed as it reads, in which case it would necessarily follow that the filing must precede the service, or that it is directory, in which case the relation of the service to the filing would be immaterial, unless it was made to appear that by reason of such relation being other than that named in the statute the party upon whom the service was made had been deprived of some right. The last construction would open the door to such a loose practice and so frequently call upon courts to enter upon an investigation of collateral questions, that it should not be adopted unless absolutely necessary. The statute when given the other construction is easily complied with, and there is no necessity for adopting a construction which would lead to such uncertainty. Beside, the legislature had an object in view when they provided that the statement should be filed before the copy was served. If the copy was served before the original was filed there would be nothing to prevent the original being changed, and the burden of making such an examination as would show that it had not been, would be cast upon the respondent. If filed before the copy was served no such change could be made. The design of the statute was that when the service of the copy of the proposed statement was made the party upon whom it was served might rely upon it as a copy of a paper of record in the cause."

43 Packard v. Spellinger, 3 Colo. 109. A bill of exceptions filed in vacation, without an order of court authorizing it, does not thereby become part of the record: Orman v. Keith, 1 Colo. 82.

44 Pollock v. Aikens, 4 S. Dak. 374, 57 N. W. 1.

ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party."[45] The same rule of law applies to bills of exceptions as to statements on motion for a new trial, in the respect that the party moving for a new trial must prepare and serve his bill of exceptions within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered either at the hearing of the motion or on appeal.[46]

If the time for giving notice of intention to move for a new trial is extended by the court, the party to whom the extension is given has as an absolute right the number of days given by the statute from the time notice is actually given within which to file his statement,[47] in addition to the time given by the extension. But it is a condition precedent to the right to demand a hearing on the motion that the statement be served within the legal time, and the time so given after service of the notice. In this respect it is immaterial that the notice was served earlier than it need have been.[48] And a party giving the notice is bound by that notice. He cannot afterward

45 Cal. Code Civ. Proc. § 659, subd. 3. In Tregambo v. Camanche etc. Co., 57 Cal. 503, the court said: "If the statute absolutely fixes the time within which an act must be done it is peremptory. The act cannot be done at another time, unless during the existence of the prescribed time it has been extended by an order made for that purpose under authority of law." And in Connor v. Southern California M. R. Co., 101 Cal. 429, 431, 35 Pac. 990, the court said: "To hold that the statement may be settled when no steps were taken until after the expiration of the ten days, the time for doing so not having been extended, and respondent objecting thereto, would be a judicial abrogation of the statute." To same effect, Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780.

46 Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50. See Cal. Code Civ. Proc., § 650.

47 Harper v. Minor, 27 Cal. 107; Chase v. Evoy, 58 Cal. 345, 352; Bunnel v. Stockton, 83 Cal. 320, 23 Pac. 301; Stevenson v. Northwestern Co. 1 Idaho, 605.

48 Chase v. Evoy, 58 Cal. 348, 352. See, also, Vischer v. Smith, 92 Cal. 60, 28 Pac. 94, Estate of Clary, 112 Cal. 292, 44 Pac. 569. Same construction given to statute fixing time for serving statement of facts on appeal; Barkley v. Barton, 15 Wash. 33, 45 Pac. 654.

give a second notice and serve his statement within the time named in the statute after the second notice, but more than the legal time after the first notice.[49]

If an order of court granting a given number of days within which to file (or serve) a statement to be used on a motion for a new trial be made before a notice of intention to move for a new trial has been given, it must be construed as extending the time to file (or serve) the statement for the same number of days from the date of the order, and not from the time the notice is given.[50] But a stipulation that within a given number of days a party may do certain specified acts, for instance, apply for additional findings, file and serve notice of intention to move for a new trial, and file and serve the statement on motion for new trial, allows performance of any of the specified acts within the time limited, and dispenses with the requirement that the statement shall be filed or served within the legal time after service of the notice, provided it be filed or served within the time named in the stipulation.[51]

The service of a copy of the judgment upon the attorneys of the defeated party after entry of the judgment, findings having been waived, is a sufficient notice of the entry of the judgment under section 650 of the Code of Civil Procedure; and if the bill of exceptions is served more than ten days after such notice, without any extension of time therefor, it must be disregarded upon appeal.[52] But where it appears that the

49 LeRoy v. Rassette, 32 Cal. 171. For distinction herein between failure to follow up a first notice with service of statement, and failure to perfect a first appeal with reference to second appeal. See Bornheimer v. Baldwin, 42 Cal. 27, 32. There is no reason, however, why a party may not abandon a first notice, giving notice of such abandonment, and instituting another proceeding, within legal time. By analogy to the practice on appeal, it would appear that he might do so.

50 Easterby v. Larco, 24 Cal. 179. Followed in Jenkins v. Frink, 27 Cal. 337, 339; Campbell v. Jones, 41 Cal. 518. At date of these decisions the Practice Act required the statement to be filed, but the Code of Civil Procedure substitutes the word "serve" for "file."

51 Walsh v. Wallace (Nev.), 67 Pac. 914.

52 Kelleher v. Creciat, 89 Cal. 38, 26 Pac. 619. There can be only one final judgment in an action; and when a judgment entered has

party has done all in his power to secure the settlement of the bill, and that the delay has been caused by the objections of the opposite party and the rulings of the superior judge in sus-

been vacated and another entered in lieu thereof, the last judgment becomes the only judgment in the cause, and the notice of its entry is the only point of time from which the right of the party against whom the judgment is entered to have a bill of exceptions settled to be attached to the judgment roll begins to run, and this is so although the new judgment was entered by direction of the appellate court upon an appeal taken by the opposite party. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876. In the first case cited above the court said: "The appellants contend that they never received any written notice of the entry of the judgment, and that their bill of exceptions was, therefore, served in time: Citing Biagi v. Howes, 66 Cal. 469, 6 Pac. 100. On the other hand, the respondent contends that the copy of the findings and the judgment served on appellant's attorneys after entry of judgment, as shown by their acknowledgment of service above set out, was a sufficient notice to meet the requirements of the code. We think the respondent's contention should be sustained. The case cited by appellants is not directly in point. The question in that case arose under a different section of the code, and it was, whether or not the defendants served and filed their notice of motion for new trial in time. The action was tried by the court without a jury, and the decision was announced on the 28th of March. The defendant's attorney was present in court at the time, waived findings, and asked for and obtained an order of court staying proceedings on the judgment for twenty days. No notice of the decision eo nomine was ever given, but notice of the rendition and entry of the judgment was given on the 5th of April following. On the 15th of the same month, the defendants gave notice of their intention to move for a new trial, and thereafter, within the time allowed by the court, prepared and served their statement. It was held that, under section 659 of the code, a party intending to move for a new trial, when the action was tried by the court without a jury, has a right to wait for a notice in writing of the decision from the adverse party, before giving notice of his intention; and he is entitled to such notice before he is called on to act, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment. In this case, written notice, in substance and effect, of the entry of the judgment was given, and the appellants acted on that notice in their proceedings to obtain a new trial. 'The law respects form less than substance': Civ. Code, § 3528; and in our opinion the notice should be held sufficient: See Barron v. Delaval, 58 Cal. 95; Mullally v. Benevolent Soc., 69 Cal. 559, 11 Pac. 215. This being so it follows that the appellant's bill of exceptions was not served in time, and hence that it must be disregarded."

taining the same, he cannot be charged with laches for delay in the matter of the settlement.[53]

When the bill to be settled is to be used upon an appeal from an order the party has ten days after the making of the order and notice thereof and such further time as the court may grant, within its authority, for serving a draft thereof upon the opposite party.[54] Nor is it any objection to service of a bill of exceptions within ten days after notice of entry of the order that the proponent of the bill had full notice of the decision, and that the order had been made more than ten days before the service of the bill. Notice of the entry or making and filing of the order is the material matter.[55]

53 Leach v. Pierce, 93 Cal. 614, 29 Pac. 235.

54 Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863. The decision was a settlement of a long unsettled and troublesome question of practice. Chief Justice Beatty, delivering the opinion, said (in part): "A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction. Taking this view of the matter, and assuming that the case is governed by section 649, that section is in its terms permissive, and the privilege granted the party of presenting his bill of exceptions for settlement at the time of the ruling is not necessarily exclusive. It would frequently be extremely inconvenient to make up a bill of exceptions instanter, and there is no reason why a court should hold itself rigidly bound to such a practice in the case of appealable orders made before final judgment, any more than in the case of similar orders made after final judgment, which was provided for in section 651. In short, we think that in a case falling under section 649, a bill of exceptions ought to be settled and allowed if presented within a reasonable time after the order excepted to, and that the analogy furnished by sections 650 and 651 should determine what is a reasonable time. The petitioner here followed the practice prescribed by those sections, and was entitled to have his bill of exceptions allowed and certified. It is only in consequence of our twenty-ninth rule that a bill of exceptions to this order is necessary. The rule does not, as perhaps it ought, prescribe any practice for the settlement of the bills of exceptions which it requires. We take the occasion, therefore, to say, that in order to comply with that rule, parties appealing from orders may follow the same practice prescribed by sections 650 and 651 of the Code of Civil Procedure."

55 Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, applying the rule to an order of probate court.

§ 427. Record must show affirmative ground for new trial or reversal—Insufficiency of evidence.

The burden is upon the party relying upon the statement to obtain a new trial to show affirmative grounds for granting it. If it be claimed that the verdict or other decision is not supported by the evidence all the material evidence bearing upon the particular point alleged to be unsupported must be included in the statement.[56] That the matters to which any specifications point must be found in the substantive part of the statement, or bill of exceptions, is perhaps a better way of expressing the same idea.[57] It will be presumed, however, that all the evidence material to the point is included unless the contrary appears, or be inferable from what appears.[58] If anything be left in the statement indicating that there is other evidence, without showing its immateriality, at any rate, if its character be not indicated so that the court of review can see that it had no important bearing on the point in controversy, it will be presumed that the evidence omitted, with what is included, was sufficient to support the finding. Where the weight or effect of evidence is to be considered, as upon motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict or finding, it is the duty of counsel for the moving party to incorporate in his proposed bill of exceptions all of the evidence which he deems material. If he omits to do so, and amendments are inserted in the proposed bill at the instance of the adverse party, to the effect that he introduced evidence "tending to prove" certain facts in support of the verdict or finding, and, in pursuance of a stipulation of the parties, the bill is settled in that form, the appellate court will hold the statement of the evidence sufficient to show a material conflict, and will refuse to grant a new trial on the ground of its insufficiency to jus-

56 Mason v. Germaine, 1 Mont. 263, 269.

57 Braverman v. Fresno Canal etc. Co., 101 Cal. 644, 36 Pac. 386. To same effect, People v. Faulke, 96 Cal. 17, 30 Pac. 837; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218; Warner v. Danow, 91 Cal. 309, 27 Pac. 737; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Shroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Cravens v. Deeney, 13 Cal. 40.

58 See post, § 687; also subsequently in this section.

tify the verdict or finding.[59] And where the statement on the motion purported to contain all the evidence, yet showed that there was a map used on the trial to which the witnesses made constant reference, and this map, without which the testimony of the witnesses was indefinite, was not contained in the statement, it was held that all doubts should be resolved in favor of the judgment.[60]

It was formerly held in California that, if the statement did not show affirmatively that it embodied all the evidence given on the trial, a new trial could not be granted on the ground that the verdict was contrary to the evidence, even if there was no conflict in the evidence contained in the statement.[61] But this case was soon criticised and overruled. It

59 Orton v. Brown, 113 Cal. 561, 45 Pac. 835; post, § 431, where whole subject is discussed.

60 Hamburg M. Co. v. Stephenson, 17 Nev. 449, 30 Pac. 1088. See, also, Cohen v. E. & P. R. R. Co., 14 Nev. 390. The first case is instructive in the facts presented as well as by reason of the reasons and conclusions of the court thereon as appears from the following taken from the opinion: "The case is presented by the record in a very unsatisfactory manner. The statement on motion for a new trial purports to contain all the evidence; and yet there was a map used on the trial to which the witnesses made constant reference in giving their testimony. The testimony shows that plaintiff has a furnace, several houses, wire and other fences, on the premises claimed by him, the Wilson ranch, as well as tunnel, shafts, and cuts made by it for the purpose of collecting water. The latter are at the south end, where we conclude the premises in controversy are situated. But it is difficult, if not impossible, to ascertain from the record the situation of many of the fences and other improvements. . . . . We are unable to say where many of these improvements are situated. In its opinion the court said: 'The testimony established, without contradiction, that the exterior boundaries of plaintiff's claim were distinctly marked by posts, furrows and postholes, except for a short distance acros the canyon, at the south side of plaintiff's and defendant's claim'; and that, as to such part, the testimony was conflicting; that as to that portion, plaintiff's testimony showed there was a wire fence until about a year prior to the trial, when it was broken by a flood, but that the posts and a ditch remained, by which the line could be readily traced. By the means of the map the above facts may have been plainly shown to the court. In the absence of the map, the expressions of the witnesses are indefinite, and any doubt must be resolved in favor of the judgment."

61 Dawley v. Hovious, 23 Cal. 103.

is the duty and privilege of the opposition or respondent to attend to the insertion of any evidence which contradicts or modifies that inserted by the movant in his proposed statement or bill. In Hidden v. Jordan,[62] the court said: "But since the decision in Owen v. Morton, and since the submission of this cause, the question has been fully discussed by counsel in another case, in which it is claimed that, if the rule ever was correct under the provisions of our Practice Act, it ought not to be applied to statements prepared under the very specific provisions of section 195 as it now stands. And, after a careful examination of the question, we are satisfied that the rule as announced in the opinion in this case harmonizes with the general theory of the other provisions of the section as construed by us, and is the proper rule to be adopted. The section provides that, 'when the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. . . . . The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points thus specified and no more.' The point wherein the defect of evidence is claimed to exist must, then, be specified, and so much of the evidence as is necessary to explain it must be introduced, and no more. The attention of the other party is thus directed to the weak point in his evidence, and if anything has been omitted which would tend to strengthen his case on that point, he has an opportunity afforded to supply it by amendment, and it is his duty to do so. And, in practice, we have no doubt that this is in all cases done. It is for this purpose, in part, that a party is authorized to have a defective or erroneous statement settled by the judge. When the statement has been filed, and the opposite party has had an opportunity to suggest the necessary amendments, and the statement has been thereupon agreed to, or settled by the judge, we think he must be regarded as being estopped from averring that there may be other testimony upon the point. As to all other points not specified in the statement, the presumption would be that the evidence sustains the

62 28 Cal. 301, 311.

verdict, and no question can be made upon it." That case was followed in subsequent cases.[63] The rule is somewhat different in Montana. In State v. Shepphard,[64] the court expressed the prevailing view as follows: "Where the judge's certificate is relied on, we think it sufficient if it uses any language by which it clearly appears that the bill contains all the evidence, or so much thereof as is necessary to demonstrate the point relied on, and there need be no adherence to any precise words in the certificate of that fact. Where the bill of exceptions itself is relied on to show the insufficiency of the evidence, it should either set forth in express language that all the evidence, or the substance thereof, or so much thereof as is necessary to illustrate the point relied on, is incorporated in the bill, or it should contain statements equivalent to such expressions, or it should show a whole, connected narrative, so constructed that it clearly appears that all the material evidence, or the substance thereof, is incorporated in the bill."

But the presumption does not hold good unless the statement possesses inherent evidence that it is a record of the proceedings at the trial, and that what is inserted as evidence was evidence actually introduced and received. And where a statement in addition to a failure to state that what it contained was the proceedings, and evidence taken at the trial, failed to state that any witness was sworn, the supreme court refused to treat it as a statement for any purpose.[65]

§ 428. Record must show affirmative ground for new trial or reversal—Errors in law.

What has been said generally, with reference to essential matter on the one hand, and redundant matter on the other, where insufficiency of evidence is relied upon, is equally applicable where errors in law are relied upon. When an error of the court is relied on to obtain a new trial, something more is

63 See Smith v. Athern, 34 Cal. 511; Clark v. Gridley, 35 Cal. 403; Judson v. Lyford, 84 Cal. 509, 24 Pac. 286; Randall v. Burk Tp., 4 S. Dak. 344, 57 N. W. 4.

64 23 Mont. 323, 58 Pac. 868. Cited and followed in Power v. Stocking, 26 Mont. 478, 481, 68 Pac. 857. See, also, Cunie v. Montana Cent. Ry. Co., 24 Mont. 123, 60 Pac. 989.

65 Paris v. Raynor, 76 Cal. 647, 18 Pac. 788.

required than the showing of an abstract error. The statement must contain all that is necessary to show that it was an error in that particular case, having regard not only to the bare point presented to the court, but having regard also to what had been previously or what was subsequently presented, if that be possible or necessary to show that the error affected "the substantial right of a party."[66]

Where the error specified is the exclusion of evidence, the record should show, in order to insure a review of the specification on motion for new trial or on appeal, just what the offer was, in order that it may be determined whether the error was or was not prejudicial. Thus, in Crusoe v. Clark,[67] the error complained of was the exclusion of defendant's books kept by plaintiff, offered in evidence by the defendant to prove the character of work done by the plaintiff as evidence of the value of plaintiff's services. The supreme court held that it was error not admit them, but, in the absence of any showing in the record as to what would have been shown by the books, it could not be assumed that the books would have shown anything material to the point. The case of Coonan v. Lowenthal[68] is another fair illustration of the importance of setting forth evidence in the record, the exclusion of which is assigned for error. In that case, the trial court had excluded a certain written agreement. The supreme court, in passing upon

66 The same idea was thus uniquely expressed in a New York case: "It is the business of the party who takes exception to show that the decision is wrong. It is not enough that he succeed in mystifying it by adopting language which subjects the judge to the suspicion that he did not understand the safest ground on which to place it": Munro v. Potter, 34 Barb. 360. Subdivision 7 of section 296 of the Code of Civil Procedure giving the right to a new trial for error of law occurring at the trial, and excepted to by the moving party, embraces error in instructions which can be brought before the supreme court in a statement on motion for a new trial, without a bill of exceptions on an appeal from the order denying the motion: Kleinschmidt v. McDermott, 12 Mont. 309, 30 Pac. 393. A ground of motion for new trial alleging error in not ruling out evidence cannot be considered when it does not appear what was the ground of the motion to rule out: Nix v. State v. 97 Ga. 211, 22 S. E. 975.

67 127 Cal. 341, 345, 59 Pac. 700. See, also, Marshall v. Hancock, 50 Cal. 82, 22 Pac. 61.

68 129 Cal. 197, 201, 61 Pac. 940.

the point, said, in substance, that, as the agreement was not set out in the record, nor anything to show its materiality, it was not justified in disturbing the judgment on that ground, inasmuch as it did not appear that the error complained of was prejudicial, or that the appellant had sustained any injury therefrom. And, generally, where the exclusion of evidence is relied on as error, the motion for a new trial (or statement) should allege as error both the exclusion of the question and the offer made by appellant to prove the facts which the answer would have proved.[69] The error relied on in a Pennsylvania case was the rejection of a witness. The appellate court admitted that he was erroneously rejected for the reason assigned, but continuing, said: "But what was he called to prove? Anything the loss of an opportunity to prove which was injurious to defendant? The bill gives no answer to these questions. We are referred to the appendix of the paper book for the offer, but the offer is not found there, either in the body of the bill or in the appendix. The substance of what McCullough was to prove ought to have been furnished, that we might see whether harm had been done." [70] And so, where it did not appear from the record on appeal that a document offered upon the trial, and ruled admissible by the court, was read to the jury as evidence, it was held that error was not shown by the record, even if it would not have been permissible to read it to the jury.[71]

Where error alleged is improper conduct of counsel in referring to a letter, copy, etc., in the absence of instructions from the record, it was presumed upon appeal that the improper reference was corrected by an instruction to the jury to disregard it.[72]

The statement need not necessarily contain all the objections made, but must, of course, contain those which, after mature consideration, are relied upon for new trial or reversal, as well as a showing that an exception was taken.[73]

69 Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

70 Lathrop v. Wightman, 41 Pa. St. 304.

71 Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104.

72 Clark v. Fast, 128 Cal. 422, 61 Pac. 72; post, §§ 684-686.

73 See post, § 671.

Alleged error in instructions to the jury will not be considered where the record upon appeal fails to set forth the testimony upon which they are predicated, and where it appears from the record that other instructions were given which are not embodied therein.[74]

Of course, it is not necessary that a statement or bill should show objections and exceptions by the successful party.[75]

The question of whether the court erred in admitting evidence, admissible as to one of several defendants and not admissible against others, may depend upon whether it was properly limited at the time of its introduction or by instruction to the jury; and where a conversation with the maker of a note who was one of the defendants was admissible against him, and not against his codefendant, but the instructions were not presented by the record. It was assumed by the court upon appeal that the trial court limited the effect of the evidence to the maker of the note.[76]

74 Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. In this case the court said: "Plaintiffs, in their notice of motion for a new trial, specified several particulars in which it was claimed the evidence was insufficient to justify the verdict, but the evidence in support thereof is not to be found in the record, and they must therefore be disregarded. Like considerations apply to the instructions given at the request of the defendant, except that marked 2, in relation to the effect of the former judgment; also to those asked on behalf of plaintiffs and refused. Not having the testimony before us upon which they are predicated, it is impossible to say whether or not the court erred. Another reason for not disturbing the judgment on account of the instructions given and refused is, that it appears from the record 'that the court, at the request of the plaintiffs and the defendant, and on the court's own motion, gave certain other further and additional instructions to the jury.' As these additional instructions are not embodied in the record, it must be assumed that, taken with those given and refused, the law of the case was properly presented to the jury." See, also, post, §§ 684-686.

75 Harris v. Frank, 81 Cal. 280, 22 Pac. 856.

76 More v. Finger, 128 Cal. 313, 60 Pac. 933. In this case the court said: "The court did not err in receiving against the objection of the appellants the testimony of the plaintiff regarding her conversation with Thomas W. Moore. Thomas was a defendant in the action, and the testimony was admissible as against him. The court would have limited the effect of his testimony in its instructions to the jury, if requested by the appellants, and, although the

§ 429. Record must show affirmative ground for new trial or reversal—Verdict against law.

Where the ground urged on motion for new trial is that a verdict is against law, in that it was contrary to the instructions of the court, it is essential that all the evidence—at least all relevant and material on the point covered by the instruction—should be contained in the statement, and if the question be carried to an appellate court, all the instructions should appear in the record. In an Oregon case,[77] the court, referring to argument of appellant's counsel, said: "He contends that, from the undisputed facts and the instructions of the court in the case at bar, the plaintiff was entitled to a verdict, and that the only remedy for the correction of the error of the jury was by motion for a new trial. But the facts on which his argument is based do not appear of record. The bill of exceptions does not contain, or purport to contain, all the evidence given on the trial, nor all the instructions of the court, and therefore we could not determine, even if the question was otherwise properly here, whether the verdict was against law or not. The pleadings present an issue of fact upon which defendant's liability admittedly depends, and this issue having been determined by the jury in favor of the defendant, we are bound to assume, in the absence of an affirmative showing to the contrary, that the verdict was supported by the testimony. Finding no reversible error in the record, the judgment of the court below is affirmed."

§ 430. Record must show affirmative ground for new trial or reversal—Excessive damages.

It would be difficult, or impossible, in any case to say that damages assessed by a jury are excessive without reference to

instructions are not in the record, we may assume that it did so limit it. Even if the plaintiff had been seeking to establish a conspiracy between Thomas and the appellants, the court did not err in receiving the testimony. The order of proof was in the discretion of the court, and, if the testimony was not subsequently connected with the appellants, it would have been stricken out upon their motion." To same effect, Place v. Minister, 65 N. Y. 89.

77 First Nat. Bank v. Linn County Bank, 30 Or. 296, 300, 47 Pac. 614.

the evidence, In fact, as has been shown,[78] that objection to a verdict may be reached on the sixth as well as on the special fifth ground mentioned in section 657 of the Code of Civil Procedure. But whether the motion be urged upon the one or the other ground, all the evidence throwing light upon the question of the amount of the damages must appear in the statement.[79]

§ 431. Brevity and conciseness commended.

The supreme court of California has repeatedly condemned prolix, profuse and "stuffed" statements. It is important to bear in mind that there is no necessity either that all the evidence or proceedings shall appear in the statement, or that the judge's certificate shall mention that it contains all that is material. In the absence of the contrary, such will be the presumption.[80] Such is the rule declared in many decisions; but in a late case there is a strong intimation that a certain advantage was gained in that case by reason of a recital in the judge's certificate that all the evidence on both sides had been inserted.[81] "It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, not-

78 See ante, chapter 12.

79 Patterson v. Ely, 19 Cal. 28; McCloskey v. Pulitzer Pub. Co., 163 Mo. 22, 63 S. W. 99.

80 See Clark v. Gridley, 35 Cal. 398; Judson v. Lyford, 84 Cal. 509, 24 Pac. 286; Hidden v. Jordan, 28 Cal. 303; Smith v. Athern, 34 Cal. 511; Grisby v. Clear Lake Water Co., 40 Cal. 405; Abbey Homestead Assn. v. Willard, 48 Cal. 619, where the court said the rule had been so often repeated that it had become trite. In the second case cited the court said: "And it has long ago been settled that the presumption is that the record contains all the evidence which is material to the points specified." The rule is the same in Utah, under similar code provisions: Cereghino v. Cereghino, 4 Utah, 100, 6 Pac. 523. But in Montana it was held where the record on appeal did not show that the statement on the motion for new trial contained all the evidence an examination could not be made: Currie v. Montana Cent. Ry. Co., 24 Mont. 123, 60 Pac. 989, following State v. Shepphard, 23 Mont. 323, 58 Pac. 868.

81 Standard Quicksilver Co. v. Habisham, 132 Cal. 115, 64 Pac. 113. The decision is discussed and the expression criticised, post, § 434.

withstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement.[82] And the supreme court looks with disfavor upon a disregard of this provision. It can scarcely be expected that trial judges will assume the work of making up a statement, the contents and arrangement of which are sanctioned by attorneys for both sides; but the attorney for the movant, or appellant, will greatly increase the chances of a new trial or reversal, if he devotes special care to conforming the statement to the above-quoted requirement, and to resisting all attempts of the opposition to "stuff" the record, by amendment.

The code provision with reference to the preparation and contents of bills of exception means the same as that with reference to statements, though the phraseology is slightly different. "The objection must be stated with so much of the evidence or other matter as is necessary to explain it and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made."[83] "It is the duty of the judge or referee in settling the bill to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible."[84]

The trial judge should refuse to sign a statement where it is a mere copy of the stenographer's notes. In Sherman v. Higgins,[85] McLeary, J., delivering the opinion, said: "It is

82 Cal. Code Civ. Proc., § 659, subd. 3. An instance of superfluous matter in a statement is where evidence is inserted in support of a finding which is not assailed: See Lewis v. Kelton, 58 Cal. 303.

83 Cal. Code Civ. Proc., § 648.

84 Cal. Code Civ. Proc., § 650. For Oregon statute and its construction, see Nosler v. Coos Bay Nav. Co., 40 Or. 305, 63 Pac. 1050, 64 Pac. 855. The fact that the statute of North Dakota nowhere provides that the evidence in the statement shall be pruned of its superfluous matter, was held not to annul the rule of the supreme court requiring the abstract of the record to be an abridgment of the evidence: Farmers' etc. Bank v. Davis, 8 N. Dak. 83, 76 N. W. 998.

85 7 Mont. 479, 17 Pac. 561; Rodoni v. Lytle, 13 Mont. 123, 32 Pac. 491, where the court said: "The statement on motion for new trial contains the evidence in form of a full transcript of the steno-

noted in the order overruling the motion for a new trial, that, 'in consideration of an order heretofore made by this court requiring the defendant to reduce the stenographer's minutes filed in said action to the form of a statement, upon motion for a new trial, not having been complied with, the said judge declined and refused to sign the same as a statement.' This action of the district judge in refusing to settle a statement wherein the evidence is composed entirely of the stenographer's notes, without being reduced to proper form, and having irrelevant matter eliminated, was entirely correct. It is the proper practice, and we hope to see it universally adopted hereafter by the judges of the trial courts. . . . . Counsel seem to misunderstand the object of filing the longhand copy of the stenographer's notes. This is done to enable counsel to prepare their statements in accordance with the facts presented on the trial, and to preserve an authentic record to which the judge may refer in settling statements as prepared by counsel. But the transcript of the stenographer's notes is not intended to take the place of the statement to be prepared by counsel, or to relieve them of the labor of preparing the statement itself. It is unnecessary to enlarge upon this matter, and we will content ourselves in referring to cases heretofore decided, in which we have announced the rule of practice which will hereafter be followed." And in Adams v. Lombard,[86] the court said: "It is true, the parties have stipulated at the end of the statement, 'that the original books of account of the Mount Pleasant mine, given or offered in evidence on said trial, may be exhibited and used by either party, or upon motion for new trial herein, or in the supreme court on appeal, without further identification, and with the same force and effect as if the same had been fully incorporated in this statement; and that, if any inaccuracies are discovered in the foregoing statement, pur-

grapher's notes, by question and answer. There was no attempt made to reduce the evidence to narrative form, and to leave out immaterial and redundant matter." And the court refused to look into the statement upon the question of sufficiency or insufficiency of the evidence. See, also, Wood v. Nissen, 2 N. Dak. 26, 49 N. W. 103.

86 80 Cal. 426, 436, 22 Pac. 180. For matters held not necessary to be incorporated in the statement, see Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724; Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

porting to be collated from said books, the same may at any time be corrected according to the books.' This is a very convenient way of making a statement, but it places a burden upon this court which, notwithstanding the fact that it is agreed to by all the parties, we decline to assume. It is the duty of the party moving for a new trial to present a statement containing the grounds upon which he intends to rely, and as much of the evidence as may be necessary to explain the same, and no more. The parties have presented for our consideration the books of the Mount Pleasant mine, kept by the defendant, twenty-six in number, covering a period of twelve years, and representing transactions amounting in value to hundreds of thousands of dollars. We do not feel called upon to perform the labor the examination of these books would impose upon us."

But while, as a rule, a bill of exceptions should make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish, yet no fixed rule can be laid down upon the subject. And in frequent instances it may be necessary to state the evidence by question and answer in order to lay before the court the exact statement of the witness, even though it may not be desired to point an exception, and it must be left largely to the discretion of the trial judge when settling the bill to determine the proper method to be pursued in any given case.[87]

§ 432. What must appear by statement or bill for purposes of review.

The broad subject of what will and what will not be reviewed without being incorporated in a bill of exceptions or statement is thoroughly discussed elsewhere.[88] Questions sometimes arise, however, whether particular files, documents and other matters properly belong in the statement or bill. A few sug-

87 Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101, holding that the statement of testimony given by talesmen when sworn upon their voir dire is properly inserted by question and answer in the bill of exceptions; also that evidence taken upon the examination of the shorthand reporter as witness, in reference to testimony claimed to have been given by defendant upon a former occasion, is necessarily inserted in the bill of exceptions by question and answer in detail.

88 See chapter 40.

gestive illustrations will be here given. As a rule, to which there are few exceptions, all documentary evidence used upon the trial must, in order to be used on appeal, be incorporated in the statement or bill, either in substance or verbatim.[89]

Though, in Montana, the notice of intention to move for a new trial is an indispensable part of the record on appeal, it is waived where the adverse party offers amendments to the statement proposed, without objecting to the want of such notice.[90]

A party applying for settlement of a statement of facts in

[89] Stickney v. Hanrahan (Idaho), 63 Pac. 189.

[90] Harrigan v. Lynch, 21 Mont. 36, 52 Pac. 642. A motion for a new trial not made a part of the record by the bill of exceptions will not be considered on appeal: Maricopa County v. Osborn (Ariz.), 40 Pac. 313. In California the notice need not be contained, nor need even be mentioned either in the statement or in the bill. In Montana the notice of intention is an indispensable part of the record on appeal and should be in the statement: Harrigan v. Lynch, supra, and cases cited. The same is true in South Dakota: Reagan v. McKibben, 11 S. Dak. 270, 76 N. W. 943. But since the purpose of the notice in the statement is to show that proper notice was given, the objection to its absence from the statement may be waived. In Harrigan v. Lynch, supra, the court said: "Plaintiffs contend that the question whether the evidence is sufficient to sustain the findings is not before the court, for the reason that the notice of intention to move for a new trial, while in the transcript, is not included in the statement on such motion or in a bill of exceptions. This court has many times held such notice of intention to be an indispensable part of the record on appeal from the order granting or denying a new trial (Gum v. Murray, 6 Mont. 10, 9 Pac. 447; Morse v. Boyde, 11 Mont. 248, 28 Pac. 260; Grinnell v. Davis, 20 Mont. 222, 50 Pac. 556); but in none of the cases did the record disclose facts from which a waiver of the objection to a want of notice would be inferred. In the case at bar, however, it is clearly shown by the record itself that plaintiffs offered amendments to the proposed statement served by defendant, without then or at any time reserving objection to the want of notice of intention to move for a new trial; and this, we think, amounted to a waiver of notice. The view stated renders unnecessary the consideration of the question whether the notice of intention to move for a new trial which is included in the transcript, but is not embraced in the statement or in a bill of exceptions, is part of the record on appeal; and the question is reserved."

the superior court cannot be compelled to embody therein a transcript of the stenographer's notes taken on the trial.[91]

Where the judgment appears in the record filed, it is not necessary that the bill of exceptions should contain the judgment, either substantially or in haec verba, in order to entitle the parties to a review of the evidence in an action tried to the court.[92]

Neither the findings of fact and conclusions of law, nor the decree entered thereon, nor the notice of appeal, with proof of service, nor the recital that a sufficient undertaking on appeal had been filed with the clerk, can be properly included in a bill of exceptions.[93] Nor is it the office of a bill of exceptions to show that the proper proceedings have been taken to effect an appeal.[94] But in Reddington v. Cornwall,[95] a construction was given to the words "documents on file in the action," used in section 648, and it was held that the original complaint, after the filing of an amended complaint, was a "document on file in the action," and that, being necessary to explain the exception to an order sustaining a demurrer appealed from, was properly incorporated in the bill of exceptions. And the same case thus practically decides that the fact that a paper is part of the judgment-roll constitutes no obstacle to its being copied into a bill of exceptions which is brought up on appeal from an order without bringing up the entire judgment-roll.

The court may limit its order for a new trial to a portion of the issues, and where such order is not appealed from or modified, it becomes final as to matter excluded therefrom, and no evidence as to such excluded matter may be properly incorporated in a final statement of the case.[96]

91 State v. Superior Court of Spokane County, 13 Wash. 514, 43 Pac. 636.

92 Baudry v. El Paso L. Co., 13 Colo. App. 508, 58 Pac. 791.

93 White v. White, 112 Cal. 577, 44 Pac. 1026. Instructions should not appear in specifications of error. Their presence there will not secure a review of alleged error in giving them: Goldman v. Bashone, 80 Cal. 146, 22 Pac. 82.

94 People v. Phillips, 45 Cal. 44.

95 90 Cal. 49, 61, 27 Pac. 40.

96 Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724.

Unless the record affirmatively shows that an order denying a motion for a new trial was made under such circumstances as to become a part of the judgment-roll, such ruling should be preserved in a bill of exceptions in order to be considered in the supreme court. The clerk's certificate of a minute entry of such order is not of itself sufficient.[97]

A draft of a bill of exceptions must be authenticated by the signature or indorsement of the attorney presenting it, or of the party, if he appears in person, and should contain a request of the party presenting it for the allowance of the bill that it may be made matter of record that such request was made; and unless such draft shows that it is one prepared and presented by a party to the cause, it need not be noticed as a paper upon which the judge or any of the counsel in the cause are called upon to act.[98]

A party cannot complain of omission in a bill of exceptions of evidence not material to questions considered on appeal.[99]

Where a claim against the estate of a deceased person is referred to the superior court for its decision, the testimony taken before the judge, sitting as a referee, although embodied in his report, is no part of the record, and cannot be reviewed upon appeal unless embodied in a bill of exceptions and filed; and it is only the finding of the referee which becomes part of the judgment-roll.[100]

§ 433. Specifications—True office of and necessity for.

According to the view of the supreme court of California, expressed in one or two cases, of the importance of specifications, the term "statement" is practically a misnomer. At any rate, its employment to designate anything separate and apart from the specifications is superfluous, the matters contained in it be-

97 Hecla Gold Min. Co. v. Gisborn, 21 Utah, 68, 59 Pac. 518. This decision is under Revised Statutes of Utah of 1898, sections 3197, 3203.

98 Landers v. Lawler, 84 Cal. 547, 24 Pac. 307.

99 Apex Transp. Co. v. Garbade, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882.

100 See Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85; Cal. Code Civ. Proc., § 1507.

ing merely incidental to the specifications. The character and function of the statement being the same under the Practice Act as under the code, the following explanation thereof by Field, C. J., in Barrett v. Tewksbury,[101] it would be difficult to amend: "The specification of the grounds is the essential element of a statement; the evidence is the mere incident. It is the 'statement of the case,' and not the evidence, which is to be annexed to the record of the judgment or order appealed from. The case on appeal consists of the questions of law or of fact raised. These must be distinctly set forth, and accompanied with only so much of the evidence as may be necessary to explain and show their pertinency and materiality, and no more. The specification is necessary, in the preparation of the statement, to enable the adverse party to suggest intelligently such amendments as he may deem important to the just determination of the case. Without it, neither the adverse party nor the judge can well know how much of the evidence should be set forth. It often happens that of numerous points taken in the progress of the trial, the greater number, after mature consideration, are abandoned by counsel, and the appeal made to rest upon only one or two of them. In such instances, a large portion of the testimony actually given becomes entirely immaterial on appeal, but without a specification of the grounds upon which the appellant intends to rely, the adverse party will be ignorant of the materiality of that which is inserted or omitted in the statement. There is no distinction, as to the manner in which a statement shall be prepared, between a case at law and a case in equity. It is as essential, for every purpose, that the grounds of appeal should be stated in the one as in the other, and in both cases much, if not the greater portion, of the evidence given in the court below will be wholly immaterial for the determination of those grounds in this court."

The principal propositions, both as to the necessity for specifications and their proper office in a statement or bill of ex-

101 15 Cal. 354, 358. The opinion in this case was quoted at length and approved in subsequent cases, among which was Hutton v. Reed, 25 Cal. 485, 486, where the court say that in it the requisites of a statement are correctly laid down. The court also proceeded further to explain the proper practice in preparing the statement. See, also, Bankhedd v. Union Pac. R. Co., 2 Utah, 510; Griswold v. Baley, 1 Mont. 552.

ceptions, have been so frequently declared by the courts that a few cases may be overlooked, and many are here purposely omitted. A few of the best expressions of the courts—those most likely to be of use to the practitioner, as a guide in the preparation and use of specifications—will be first inserted, to be followed by illustrations of peculiarities and special views on the subject. In Raymond v. Thexton[102] the court said: "The specification of errors 'form (to use the language of a former decision of this court) the framework of the statement'; it is the basis of the edifice; and the evidence is only produced to strengthen and support the structure and make it complete." Rhodes, C. J., delivering the opinion in Spencer v. Long[103] said: "The statement on the motion for a new trial was not properly prepared. The grounds of the motion are not contained in the statement. There was annexed to the statement an unsigned paper, containing the grounds of the motion, but it constitutes no part of the statement, and the defendant was not entitled to be heard upon such a specification of the grounds of the motion. The grounds are indispensable to the statement. They constitute its basis, and if they are wanting, the statement should be disregarded." In Bradshaw v. Brumagin[104] the court, per Crockett, J., thus discussed the policy and purpose of the statutory requirement: "The notice of motion for a new trial specifies, as one of the grounds, the insufficiency of the evidence to justify the verdict, and, as a separate ground, that the verdict is against law. The statement in support of the motion fails to specify the particulars wherein the evidence was insufficient to justify the verdict as required by section 195 of the Practice Act, which provides 'that, if no specification be made, the statement will be disregarded.' But the statement purports to contain all the evidence given on the trial; and the counsel for the appellant insists, with much earnestness, that if it clearly appears, from all the evidence, that the verdict ought to have been for the defendants, then the verdict is against law and ought to be set aside on that ground, notwithstanding the omission to specify in the statement the particulars

102 7 Mont. 299, 304, 17 Pac. 258.

103 39 Cal. 700, 706.

104 39 Cal. 24, 33.

wherein the evidence was insufficient to support the verdict. But the argument in support of this proposition, however plausible, is based on a misconception of the true intent of this provision of the Practice Act. Prior to the adoption of this provision, it was sufficient for the moving party to allege, in general terms; in his notice of motion, that the evidence was insufficient to justify the verdict, without specifying any particulars wherein it was insufficient. The practical result was that the adverse party had no notice of the particular ground on which the verdict was to be assailed in this respect. He came to the argument of the motion in utter ignorance of the points on which his adversary would rely in respect to the insufficiency of the evidence. If the evidence was voluminous, and the questions at issue perplexing and difficult of solution, he was placed at a great disadvantage on the argument of the motion for want of an opportunity for previous preparation in collating the evidence and showing its force and effect, as applied to the questions in issue."

The distinction now established in California, and perhaps in other states between statements and bills of exceptions, wherein specifications of error as well as specifications of insufficiency, are still required in the former, while in the latter only specifications of insufficiency of evidence is required, should not be lost sight of in this connection.[105] It qualifies and even nullifies part of many decisions which it is found necessary to cite for other purposes.

An important feature of the provision is that the specifications are required for the purposes and as a limitation upon the power of the trial court. Its form being mandatory, and jurisdictional if the statement, where insufficiency of evidence to justify the decision is relied upon, does not contain the required specifications, it is the duty of the trial court to disregard any such alleged insufficiency.[106] So great importance

105 See ante, § 423.

106 Sanchez v. McMahon, 35 Cal. 218; Burnett v. Pacheco, 27 Cal. 408; Vilhac v. Biven, 28 Cal. 409; Pralus v. Pacific Gold etc. Min. Co., 35 Cal. 30; Butterfield v. Central Pac. R. R. Co., 37 Cal. 381; Harding v. Vandewater, 40 Cal. 77; Hill v. Weisler, 49 Cal. 146; Crane v. Gladding, 59 Cal. 303; Coveny v. Hale, 49 Cal. 552; Benjamin

is attached to the statutory requirement that it is held that the opposite party need not follow up a statement which fails herein, but may presume that the trial judge will disregard it on the motion. In De Molera v. Martin[107] the court said: "The adverse party is to be advised of the points relied on in order that he may intelligently propose such amendments to the statement as will support the decision and that the judge may be enabled in settling it to determine whether any portion of the statement is 'useless and redundant matter' in respect to the particulars which are specified. Unless the particulars in which the evidence is claimed to be insufficient are specified the party cannot know what amendments to propose or whether all of the evidence relating to the points upon which the moving party intends to rely is inserted in the statement. If certain particulars are specified, the adverse party is justified in assuming that these are the only ones which will be considered upon the motion, and he is not required to propose as amendments to the statement the insertion of any evidence other than such as relates to these particulars. If no particulars are specified, other than by the general ground of insufficiency of the evidence, it would be necessary to incorporate all of the evidence of the case in the statement, and there could be no redundant or useless matter for the judge to strike out. And in the absence of such specification he is not called upon to propose any amendments, but has the right to assume that the court will follow the statute and disregard the statement."

v. Stewart, 61 Cal. 605; Bate v. Miller, 63 Cal. 233; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Green v. Green, 103 Cal. 108, 37 Pac. 188; De Malera v. Martin, 120 Cal. 544, 52 Pac. 825; Thompson v. Los Angeles, 125 Cal. 270, 57 Pac. 1015; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950; Demers v. McCormick, 3 Mont. 234, 2 Pac. 350; Bass v. Baker, 6 Mont. 442, 12 Pac. 922; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; McLeod v. Dickenson, 11 Mont. 439, 28 Pac. 551; Nelson v. Jordeth, 15 S. Dak. 46, 87 N. W. 140; Billingsley v. Hiles, 6 S. Dak. 445, 61 N. W. 687; Parrott v. Hot Springs (City of), 9 S. Dak. 202, 68 N. W. 329; Sutherland v. McIntire (Tex. Civ. App.), 28 S. W. 578.

107 120 Cal. 544, 546. To same effect, Edelbuttel v. Darrell, 55 Cal. 279.

A defendant may not cover his defenses by specifying insufficiency of evidence to sustain the finding for plaintiff, though in broad sense such finding implies a negation of the defense. Thus, where a defendant in ejectment moved for a new trial, and relied upon the point that he was entitled to recover upon his evidence of adverse possession, it was held that he should have included that among his specifications, and that it was not sufficient merely to aim a specification at the insufficiency of evidence of plaintiff's ownership.[108] On the other hand, it is of no avail to a plaintiff that there is ample evidence in favor of his allegations, denied in the answer, where the court has found the truth of facts well pleaded as affirmative defenses, even though there be an insufficiency, or even no evidence in support thereof, unless specifications directed at such unsupported findings are also included.[109] As a further illustration of this rule it was held that a finding that there was no misjoinder of defendants, would be presumed to be supported by the evidence in the absence of any specification of insufficiency.[110] It necessarily follows from what precedes that any grounds of objection on the score of insufficiency not specified are waived.[111] It is equally obvious that such an omission is not supplied by a general concluding and sweeping assignment or specification of "various other reasons apparent of record."[112]

While considering specifications of insufficiency of evidence, both bills of exceptions and statements were constantly in view. Now, we come to specifications of errors in law, with special reference to the necessity therefor, and we may, pro haec vice, for the moment and at least as to certain states, lose sight of bills of exceptions, and confine our attention to statements.[113]

It is well to begin with the general proposition, the same being a mere restatement of statutory provisions, that a state-

108 Abbey Homestead Assn. v. Willard, 48 Cal. 614.

109 Rauer v. Fay, 128 Cal. 523, 61 Pac. 90.

110 O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950.

111 Beans v. Emanuelli, 36 Cal. 117.

112 West Chicago Street Ry. Co. v. Krueger, 168 Ill. 586, 48 N. E. 442.

113 See ante, § 423.

ment on motion for new trial which contains no specifications of error should be disregarded on the hearing of the motion.[114]

So far are the specifications of errors an insufficiency vital to a statement that after the legal time for filing the statement the court has no power to permit their omission to be supplied

114 Nye v. Marysville etc. Street R. R. Co., 97 Cal. 461, 32 Pac. 530; Walls v. Preston, 25 Cal. 61; Levy v. Getleson, 27 Cal. 685; Hawkins v. Abbott, 40 Cal. 639; Budd v. Drais, 50 Cal. 120; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Hershey v. Kness, 75 Cal. 115, 16 Pac. 548; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137; Estate of Black, 132 Cal. 392, 64 Pac. 695; Field v. Grey, 1 Ariz. 404, 25 Pac. 793; Slater v. Union Pac. Ry. Co., 8 Utah, 178, 180, 30 Pac. 493; Murray v. Heinze, 17 Mont. 366, 42 Pac. 1057, 43 Pac. 714; State v. Mason, 18 Mont. 364, 45 Pac. 557; Anderson v. McLaughlin, 1 Mont. 81; Cannon v. Wood, 10 Mont. 500, 26 Pac. 388; Gallatin Canal Co. v. Lay, 10 Mont. 531, 26 Pac. 1001; Gallagher v. Cornelius, 23 Mont. 27, 57 Pac. 447; McLeod v. Dickenson, 11 Mont. 438, 28 Pac. 551, holding that supreme court precluded from examining errors not specified; Earles v. Gilham, 20 Nev. 46, 14 Pac. 586; Corbett v. Job, 5 Nev. 201; Caldwell v. Greeley, 5 Nev. 258; McWilliams v. Hershman, 5 Nev. 263; Meadow Valley Min. Co. v. Dodds, 6 Nev. 261; Clarke v. Lyon Co., 8 Nev. 182; Sherman v. Shaw, 9 Nev. 148; Elder v. Shaw, 12 Nev. 81; Laurance v. Byrnes, 17 Nev. 201, 30 Pac. 700; Nelson v. Jordeth, 15 S. Dak. 46, 87 N. W. 140; Gill v. Hecht, 13 Utah, 5, 43 Pac. 626. In Cannon v. Wood, supra, the court said: "The points presented by appellant's brief for consideration here are far more numerous than the exceptions saved and the specifications of error comprised in the record. We must confine our review to the record in this respect"; citing Mont. Code Civ. Proc., § 298. In McLeod v. Dickenson, supra, the court said: "The transcript does not contain a specification of errors or bill of exceptions, and the action of the court below which is complained of relates solely to a motion for a new trial and cannot be reviewed. The practice of this court has been uniform upon the subject: Taylor v. Holter, 2 Mont. 476; Bass v. Bucker, 6 Mont. 442, 12 Pac. 922; Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258, and cases cited." In Gallagher v. Cornelius, supra, the court said: "Insufficiency of the evidence to justify the decision, and errors in law occurring at the trial, are the grounds upon which, in their notice of intention, the defendants say they will move for a new trial; but the omission from the statement of the case on such motion of any specification of errors in law restricts our investigation to a consideration of the evidence." In Earles v. Graham, supra, the court said: "The statute declaring how and when statements shall be prepared and filed, provides that

by amendment. And in Earles v. Graham[115] the court said: "A judgment was rendered in this action in favor of appellant on the second day of July, 1886, and, within the statutory time thereafter respondents served and filed what purported to be a statement on motion for a new trial. There were no assignments or specifications of error stated therein. Appellant did not file any amendments thereto, and the time for filing such amendments expired on the 20th of August, 1886. On the 21st of September, 1886, respondents moved the court to amend the paper on file by adding thereto the specifications of error which had, as claimed in an affidavit, been inadvertently omitted. The court made an order permitting such an amendment to be made. Did the court have any authority to

'when the notice designates, as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, error in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded': Gen. Stats., 3219; Civ. Proc., Act., § 197. These provisions have always been deemed imperative. Since the adoption of the statute, this court has uniformly and repeatedly declared that, if the statement does not contain the specifications, it will be disregarded: Corbett v. Job, 5 Nev. 201; Caldwell v. Greeley, 5 Nev. 258; McWilliams v. Hershman, Id. 263; Meadow Val. M. Co. v. Dodds, 6 Nev. 261; Clarke v. Lyon Co., 8 Nev. 182; Sherman v. Shaw, 9 Nev. 148; Elder v. Shaw, 12 Nev. 81; Lamance v. Byrnes, 17 Nev. 201, 20 Pac. 700. The conclusions arrived at were reached upon the ground that the specifications of error, by the clear language of the statute, are made an essential part of the statement. If omitted, there is no statement for the courts to act upon." In Corbett v. Job, supra, the court disregarded a so-called statement on appeal which did not contain a statement of the particular errors or grounds relied upon, because it was "in no sense a statement." In McWilliams v. Hershman, supra, the court in commenting upon the statutory requirements of a statement on motion for a new trial, said: "The statement, until the errors to be relied on are properly specified, is virtually no statement," and that "the court has no more right to grant a new trial upon a statement, defective as this is, than it has where there is no statement at all."

115 20 Nev. 46, 14 Pac. 586. But see post, § 446.

make this order? Was there any statement on file to be amended? Statements on motion for a new trial must be filed within the statutory time. Courts have no authority to extend the time for filing a statement after the statutory time has expired. . . . . The paper filed by respondents did not comply with the provisions of section 197. One of the essential elements of a statement on motion for a new trial was entirely omitted. The court had no more authority to allow an amendment to this paper, after the time for filing a statement had expired, then it would have to grant leave to file a statement after the expiration of such time, or to grant a new trial without any statement. There was no statement on file upon which to base an amendment, and the court could not, under such circumstances, impart vitality and life to a thing that did not exist." It is not enough that in the history of the case, exceptions appear scattered here and there through a statement; but it is necessary to specify in some particular part of it the particular errors upon which the party will rely. In Beans v. Emanuell[116] the court said: "Although not necessary to a decision of the points now under discussion, some remarks in appellant's closing brief render it proper to say that it is not enough that in the history of the case exceptions appear scattered here and there through the statement, for a great many exceptions are taken in the course of a trial which are afterward not relied on, and, under the statute, it is necessary in the statement to 'specify the particular errors upon which the party will rely.' This language of the statute is plain, and has been so often explained and illustrated, and the rule prescribed enforced by this court, that there does not now seem to be any good reason for departing from the practice established. If the grounds are not specified in the mode prescribed, the only thing we can do is to obey the injunction of the statute, which is, 'if no such specification be made, the statement shall be disregarded.' As to the points under consideration, there is 'no such specification,' and to that extent the statement must be disregarded."

The mere fact that there is but one point upon which a party raises a question of error does not excuse the necessity for a specification. In Zenith Gold etc. Mining Co. v. Irvine[117]

116 36 Cal. 117, 121.

117 32 Cal. 302.

the court, in a few apt words, gives ample justification for this application of the general rule, thus: "If it be true that there is only one question of error that could by possibility be raised upon the record, it does not follow that the plaintiff intender 'to rely' upon that. If such was his intention, he could not safely conceal it, nor could he leave it open to argument, or inference." And error relied on in granting a nonsuit, though it be the only matter excepted to, must be pointed out in a separate specification.[118]

§ 434. Sufficiency of specifications—Insufficiency of evidence. It is not necessary that the specifications shall be in any particular form, if it can be seen that they sufficiently point out to the adverse party the particular grounds upon which the moving party relies, and thus enables the former to prepare such amendments as will fully set forth the evidence upon that point. Form is, however, often inseparable from substance; and when, as has been so frequently said, no particular form is necessary, the expression should be merely accepted to mean that from the nature of the case no stated, or even adaptable form can be prescribed. But, as was said in Dawson v. Schloss,[119] the specifications "should in some form distinguish

118 Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146. Generally, that error in granting a nonsuit must be specified, see McCreery v. Everding, 44 Cal. 284; Donahue v. Gallavan, 43 Cal. 573.

119 93 Cal. 194, 200, 29 Pac. 31. To same effect, Edelbuttel v. Durrell, 55 Cal. 277; McCullough v. Clark, 41 Cal. 298; Smith v. Ellis, 103 Cal. 294, 37 Pac. 400; Estate of Yoakum, 103 Cal. 503, 37 Pac. 485; Patten v. Hyde, 23 Mont. 23, 57 Pac. 407; Vogt v. Baldwin, 20 Mont. 322, 51 Pac. 157. A verdict involves a decision upon questions of law as well as of fact; and a specification in the statement on motion for a new trial that "the evidence is wholly insufficient to justify or sustain said verdict, and, on the contrary, the evidence shows that said verdict should have been in favor of the petitioners," is insufficient. In re Strock, 128 Cal. 658, 61 Pac. 282. In Bledsoe v. Decrow, 132 Cal. 312, 316, 64 Pac. 397, a specification in these words: "They also specify that the evidence was insufficient to justify the finding of fact as to the appropriation of water by the defendants in 1879, and the quantity and continuance thereof, and the location of ditches and the intake thereof," was held sufficient. In Edelbuttel v. Durrell, supra, the court speaking with reference to general specifications said: "In the case before

each particular proposition of fact excepted to from all others found by the court, or involved in the general verdict of a

us there is not even an attempt made to specify the particulars in which the evidence is alleged to be insufficient to sustain the findings of the court below. Appellants might as well have said, in a general way, that none of the findings of the court were sustained by the evidence. The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement, and considered by the court." In Smith v. Ellis, supra, the trial court had, on motion of the opposition, stricken out the specifications as not being sufficiently definite, disregarded the statement and denied the motion. The supreme court in reversing the orders and directing the trial court to hear the parties, said: "A careful examination of the specifications objected to satisfies us that the action of the court in disregarding them was erroneous; that, while perhaps inartificially expressed in some respects, they were in no substantial respect insufficient to point the particulars in which it was claimed the evidence failed to support the findings. . . . . Neither the court nor the defendants are left in doubt as to the particulars in which the plaintiff deems the evidence insufficient to sustain the findings excepted to. They are not open to the objection raised in the cases cited by respondents, either as being too general, or in being a mere recital of what the evidence does show. Without stating them in detail, we regard them as fully up to the specifications held sufficient in Harnett v. Central Pac. R. R. Co., 78 Cal. 32, 20 Pac. 154. This being so, the plaintiff was entitled, on his motion for a new trial, to a ruling by the lower court upon the sufficiency of the evidence to sustain its findings in the light of these specifications, and the action of the court in the premises was the denial to plaintiff of a substantial right: Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672." In Vogt v. Baldwin, supra, the court intimated that the fact that the specification was sufficient to induce consideration of the point in the trial court was material saying: "The object of the assignment of error is to call the attention of the court to the action complained of. The court certainly had its attention sufficiently called to the action complained of by the assignment in question, for in its error the court particularly refers to it, and grants the new trial on account thereof." In Patten v. Hyde, supra, the court said: "We think that the specifications are sufficient to point out the particulars in which the evidence is alleged to be insufficient to justify the verdict. They are not as explicit in form as they might have been if they had strictly followed the rule approved of in First National Bank v. Roberts, 9 Mont. 323, 23 Pac. 718, and Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740; but they certainly gave the plain-

jury." And, in addition to this requirement as to separate statement, each need be only full enough to enable the court to understand the question presented.[120] Thus, in Harnett v.

tiff notice, and advised the court in plain language of the matters that would be urged on the hearing of the motion." The language of the court in Strasburg v. Beecher, referred to in the above quotation is, in part, as follows: "In case of First National Bank v. Roberts, 9 Mont. 323, 23 Pac. 718, we disapproved of specifications which declared that the evidence showed certain enumerated facts or conclusions which were contrary to what the jury found. The court held that a specification should point out the variance between the facts found by the jury and the evidence, and that there should be a specification that a fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient to justify the finding. We have no hesitation in affirming what the court said. Furthermore, much that was laid down is applicable to several specifications, other than the one quoted, in the case at bar; for in them it is declared that the evidence proved that on etc., which declaration is followed by a resumé of the conclusions of counsel as to what was proved on the trial of the case. All such specifications are to be condemned, because, as was held in First National Bank v. Roberts, supra, this simple fact puts the appellate court upon an inquiry as between the conclusions of the judge and the opinion of appellant, as to what the evidence shows."

120 Newell v. Desmond, 63 Cal. 242. See, also, Smith v. Ellis, 103 Cal. 294, 37 Pac. 400; Parker v. Reay, 76 Cal. 105, 18 Pac. 124; Meads v. Lasar, 92 Cal. 221, 28 Pac. 935; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042. Specification that court erred in finding as it did and not finding to the contrary is insufficient: Heilbron v. Centreville etc. Ditch Co., 76 Cal. 8, 17 Pac. 932; Coglan v. Beard, 67 Cal. 293, 7 Pac. 738; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711, to same effect. For rule in South Dakota, see Johnston L. M. Co. v. Case, 13 S. Dak. 28, 82 N. W. 90; Anderson v. Medbury (S. Dak.), 92 N. W. 1087, holding requirement of the statute mandatory. Where the testimony is all in the record, and the specifications of insufficiency of the evidence point to each of the probative facts contained in the findings attacked upon appeal, and are sufficient fairly to notify the respondent of the contention that would be urged against the finding upon appeal, the specifications of particulars are sufficient: Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277. Where there is an entire absence of evidence to sustain a finding, it is not necessary to specify the particulars in which the evidence is insufficient to justify it, but under a general assignment of insufficiency of evidence to justify it, the burden should be on the party sustaining the findings to call attention to enough evidence to justify it: San Luis Obispo Water Co. v. Estrada, 117 Cal. 168, 48

Central Pac. R. R. Co.,[121] the specification pointed to the want of evidence that the party committing the injury was an employee of the defendant, and it was held sufficient; in De Brutz v. Jessup,[122] the specification pointed to the amount of damages that had been sustained; in Brenot v. Brenot,[123] the specification pointed to the person with whom an act of adultery had been committed.

It has been frequently decided, and is well settled, that specifications which merely attack the judgment or conclusions of law cannot be considered.[124] Such specifications are objectionable not only because they seek to raise issues not involved upon a motion for a new trial, but also because they consist of legal conclusions. Thus, in Anthony v. Jillson,[125] the court said of a specification that it "amounted merely to a legal proposition, and did not point to any finding of fact."

It appears to be well settled that, if there is no evidence in support of a finding, a specification that there is no evidence

Pac. 1075. In North Dakota no specifications of particulars wherein appellant claims evidence is insufficient is required where case is tried by the court. The requirement pertains to jury cases and not to cases tried by the court: Erickson v. Citizens' Nat. Bank, 9 N. Dak. 81, 81 N. W. 46. For practice in Wyoming, see Board of Commrs v. Shaffner (Wyo.), 68 Pac. 14. Where there has been a motion to direct a verdict the court is required on appeal to review the evidence, in order to determine whether as a matter of law, the verdict was properly directed, or the motion denied; and in such case it is not necessary that the bill of exceptions should specify the particulars in which the evidence is insufficient: Brady v. Krueger, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083.

121 78 Cal. 32, 20 Pac. 154.

122 54 Cal. 118.

123 102 Cal. 294, 36 Pac. 672.

124 Martin v. Matfield, 49 Cal. 41; Coveny v. Hale, 49 Cal. 552; Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22; Anthony v. Jillson, 83 Cal. 296, 299, 23 Pac. 419; Mazkewitz v. Pimental, 83 Cal. 450, 23 Pac. 527; Curtis v. Walling, 2 Idaho, 416, 18 Pac. 54; Marshall v. Golden Fleece Min. Co., 16 Nev. 156, 174; Welland v. Williams, 21 Nev. 230, 234, 29 Pac. 403; Caldwell v. Greely, 5 Nev. 260.

125 83 Cal. 296, 299, 23 Pac. 419. See, also, Mayes v. Griffin, 35 Cal. 556; Coveny v. Hale, 49 Cal. 552; Thorne v. Hammond, 46 Cal. 534; Doherty v. Enterprise Min. Co., 50 Cal. 187.

is sufficient.[126] And such form of specification was held sufficient where there was only slight evidence to sustain a particular finding or a particular thereof.[127] It is difficult to suggest anything more or different that one could say by way of specification in such case. But one should be sure of his ground before making and standing upon such bold and bare a specification in regard to a material finding, or fact implied in a verdict. And care must always be taken that such bare negation is not too broad. It must not, any more than any other kind of specification, amount to a mere attack upon the general decision. In Dawson v. Schloss,[128] the court said: "It is further alleged: 'There is no evidence to support the verdict as against the defendant Schloss'; but this is not a specification of any particular one of the several facts involved in and affirmed by the verdict. If this is sufficient, it would be sufficient, in any case tried without a jury, to allege merely that there is no evidence to support the findings of fact, even though there may be twenty distinct findings of fact."

The distinction between a specification which is too general and one which is above criticised in that respect is often difficult to point out. In no branch of the practice are the discriminating qualities of the mind more in demand than in selecting the crucial facts in a case depending upon a determination of many facts, some ultimate, some probative and others mixed with conclusions of law.

There seems to be an exception to the strict rule, based upon necessity and convenience, in the case of verdicts for damages for tort which are objected to as excessive. And it is held that

126 Knott v. Peden, 84 Cal. 300, 24 Pac. 160; Dawson v. Schloss, 93 Cal. 194, 200, 29 Pac. 31; Owen v. Pomona Land etc. Co., 131 Cal. 530, 539, 63 Pac. 850, 64 Pac. 253; De Molera v. Martin, 120 Cal. 544, 547, 52 Pac. 825. In Strasburger v. Beecher, 20 Mont. 143, 146, 49 Pac. 740, the court said: "If there is a designation of a material fact at issue, and a specification that there was a failure to prove that designated fact in any manner by the party whose duty it is to prove it, we believe it is sufficient to enable the court to examine whether the finding complained of is sustained by the evidence."

127 Owen v. Pomona Land etc. Co. 131 Cal. 530, 539, 63 Pac. 850, 64 Pac. 253.

128 93 Cal. 194, 29 Pac. 31.

the defendant moving for a new trial in such cases may state, by way of specification, that the verdict or finding, however general, is not sustained by the evidence.[129] And the same is true where the plaintiff in such cases moves for a new trial on the ground that the damages awarded are too small.[130] There is good reason for this exception. It is impossible to see what else could be said by way of specification, unless all the evidence were set forth in the specification.

The rule was also relaxed where, although the specification was a mere challenge of sufficiency of evidence to sustain the decision of ownership, held to be the ultimate question for decision in the case, the parties had, by stipulation, narrowed the issues to a single issue of fact—to wit, a question of residence of a party on certain premises.[131]

But it is necessary to distinguish between cases where a verdict or other decision in an action for tort is objected to for insufficiency of evidence and those in assumpsit or ex contractu. The latter are not reached by the general ground for new trial given by statutes as for excessive damages. If the amount awarded be considered either excessive or inadequate in an action ex contractu, or in any case where damages are claimed for the taking of or for injury to property which are susceptible of computation by known standards, the usual rules governing

129 De Brutz v. Jessup, 54 Cal. 118. See, also, Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108. In the second of the cases here cited the specifications were as follows; that; "the verdict of five hundred dollars returned will not compensate plaintiff for the detriment proximately caused by said injury, and is not equivalent to the amount plaintiff will lose in one year as wages in earning capacity alone"; and that "the amount of the verdict (five hundred dollars) is wholly inadequate and insignificant as compensation for the damage sustained from said injury." The court held the specifications sufficient, citing De Brutz v. Jessup, 54 Cal. 118, and Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473.

130 Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108. See Livermore v. Stine, 43 Cal. 274, holding that, on appeal, the point that the verdict is for too small a sum cannot be considered if it be considered unless particularly specified in the statement.

131 Tromans v. Mahlmans, 92 Cal. 1, 8, 27 Pac. 1094, 28 Pac. 579, opinion of court upon petition for rehearing. The account of an

specifications are applicable. Accordingly, where, in an action for a balance alleged to be due upon a mutual and open account, the amount awarded by the verdict was objected to by the plaintiffs as being too small, it was held that a mere general specification in the statement that "the evidence was insufficient for the jury to find that plaintiffs were only entitled to judgment for the sum" specified in the verdict, without setting forth what additional items of credit were claimed to be established by the evidence was merely equivalent to saying that the verdict should have been for a larger sum, and was not available as a specification.[132] It seems, however, that where the only contested issue in a case is the value of or damages

administrator is a bill of items and specifications of the insufficiency of the evidence to justify the decision settling the account and the specifications of insufficiency are stated with sufficient particularity for all appellate purposes when the evidence is alleged to be insufficient to justify the decision allowing particular items of the account specified in the bill of exceptions: Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. In the first case above the court on rehearing said: "In regard to the point urged in the argument and in the petition for a rehearing, that there was not in the statement on motion for a new trial any sufficient specification of the particulars in which the evidence was insufficient to sustain the findings of the superior court, we wish to add to what is said in the opinion of the commissioner, that we should not regard these specifications as insufficient except for the fact disclosed by the statement that all the facts of the case were settled by stipulation of the parties, except the single issue of the residence of the Mahlmans, on the demanded premises at the date of their declaration of homestead. In other words, the specifications which are entirely too general in themselves are aided by the fact that there was but one specification issue tried."

132 Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310. the court saying: "Appellants assert that the specification 'is all it could be,' but we think they at least have made it state, as they have stated in argument, what items of credit in their favor they deemed to be established without material conflict of evidence." A specification of insufficiency of evidence, "that the evidence clearly showed that the total amount due . . . . was not the sum of ———, but was the sum of ———, and no larger or greater sum whatever," held insufficient: Love v. Anchor Raisin Vin. Co. (Cal.), 45 Pac. 1044.

to, property detained, a general specification directed to that point will suffice.[133]

An instance of two specifications, or rather of what were relied upon as specifications, but which the court held were not specifications because so broad as to be equivalent to a challenge of the court's decision upon the whole issue is found in the case of De Molera v. Martin,[134] as follows: "The evidence is insufficient to justify the decision of the court that the plaintiff was at any time the owner and possessed and entitled to possession, and was at the time of the commencement of this action, the owner and entitled to the possession of the tract of land in controversy in this action, in this, to wit, that the evidence shows that at no time has the plaintiff been the owner or been possessed or been entitled to the possession of said real property, or any part or parcel thereof, but that, on the contrary, at the time this action was commenced, the defendant was, and ever since has been and now is, the owner and entitled to possession of the same. The evidence is insufficient to justify the findings of the court that the defendant at any time without right or title entered into and upon said premises and estate and ejected the plaintiff therefrom, or that he unlawfully withholds the possession thereof from the plaintiff. The evidence, on the contrary, shows that the defendant never did oust or eject the plaintiff from said premises, or any part thereof, and was, at the time this action was commenced, and ever since has been, lawfully in possession of the same." The court refused to investigate the question of the sufficiency of the evidence, giving its reasons in these words: "The above specification, that the evidence is insufficient to justify the decision that the plaintiff was at any time the owner and entitled to the possession of the land in controversy, is but a repetition of the ground designated in the notice of intention to move for a new trial, instead of a specification of any particular in which the evidence is sufficient, and is merely a statement that, upon a con-

133 Livestock Gazette Pub. Co. v. Union Stockyard Co., 114 Cal. 447, 46 Pac. 286.

134 120 Cal. 544, 547, 52 Pac. 825. See, also, Griswold v. Baley, 1 Mont. 545; Taylor v. Holter, 2 Mont. 477; Raymond v. Thexton, 7 Mont. 305, 17 Pac. 258; Fant v. Tandy, 7 Mont. 447, 17 Pac. 560.

sideration of the entire evidence, the decision should have been otherwise, and is not a specification of the particulars in which the evidence is insufficient. If a finding is of an ultimate fact which results from the establishment of several probative facts, these probative facts constitute the particulars from which the ultimate fact is drawn, and, if it is claimed that the evidence is insufficient to establish any of these probative facts, the particulars of such insufficiency should be specified in the statement. . . . . The latter part of the foregoing specification, beginning with the words, 'in this, to wit, that the evidence shows,' etc., is only a repetition in another form of the general declaration of the insufficiency of the evidence to justify the decision, and is in no respect to be considered a specification of any particular in which it is insufficient. What 'the evidence shows' is but an argument upon the result to be deduced from a consideration of the entire evidence in the case, and is not the specification of a particular in which it is insufficient. Such specification has been frequently held to be insufficient." [135] In Wise v. Burton,[136] the findings of the court were of the most general character—namely, that the plaintiffs were, at a day anterior to the commencement of the action, owners, and seised in fee and possessed of the land in suit; and that defendant had wrongfully, etc., ejected them from such possession. The specifications of insufficiency were equally general and were aimed at the findings. The court held, however, that, inasmuch as the findings were general, and the specifications followed them, the latter must be held sufficient. It was said in the above-mentioned case of De Molera v. Martin that this case

135 That a recital in a specification of what the evidence shows is useless and of no value to help out a specification otherwise defective, see, also, Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Kumle v. Grand Lodge, 110 Cal. 204, 42 Pac. 634; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Baird v. Peall, 92 Cal. 235, 28 Pac. 285, where the court remarked that "what 'the evidence shows' should not be argued or considered until the hearing of the motion"; Zickler v. Deegan, 16 Mont. 198, 40 Pac. 410,

136 73 Cal. 166, 14 Pac. 678. Following Morris v. De Celis, 51 Cal. 60, and citing De Brutz v. Jessup, 54 Cal. 118, the latter of which cases does not however, support the court's conclusion.

and all cases of like tenor and effect should be treated as overruled.

The case of Wise v. Burton is distinguishable from the much later case of Standard Quicksilver Co. v. Habishaw,[137] in the respect that any defects of the specifications on the score of generality were considered to be cured by the fact that the statement recited that it contained all the testimony which was offered by either party, and admitted in the case. It is difficult to see wherein such a recital is any better than the presumption to the same effect, so often declared by the same court where nothing appears to indicate that there was other evidence.

But a slight change or difference in the issues or character of the action may render the question of ownership one of the links in the chain of evidence supporting the decision and not itself the whole question to be decided; and in such case, the decision from which the last quotation is made above would not be authoritative.

The distinction between an improper specification, because too broad, and one which was proper is clearly shown in Kelly v. Mack,[138] an action brought to enforce a vendor's lien, where it was held that the specification, "the evidence is insufficient to show that plaintiff has a vendor's lien upon the land," failed

[137] 132 Cal. 115, 64 Pac. 113.

[138] 49 Cal. 523. See McLennan v. Wilcox, 126 Cal. 51, 58 Pac. 305, holding that a finding that the plaintiff is the owner and entitled to the possession of the real estate described in the complaint, was not sufficiently assailed by a specification in the notice of intention to move for a new trial upon the minutes of the court, "that the evidence is insufficient to justify said decision that plaintiff is the owner," etc., without specifying any particulars in which it was alleged to be insufficient, and that the evidence to support such finding could not be examined upon appeal. In this case the motion in the lower court was made upon the minutes. The court said: "The finding is not attacked in such manner as to enable this court to review it. The notice of intention shows the only specification to be 'that the evidence is insufficient to justify said decision that plaintiff is the owner of each of said lots or either of them, and that plaintiff is entitled to the possession of said property or any part thereof.' The notice of motion must specify the particulars in which the evidence is alleged to be insufficient: Code Civ. Proc., § 659, subd. 4. Here we are simply told that the evidence is insufficient

to comply with the statute, for the reason that it was merely an averment in effect that the cause of action as set forth in the complaint was not sustained by the evidence. In the same case, it was held that a specification that 'the evidence is insufficient to show that the plaintiff was the owner of the land at the time of the sale was a sufficient specification of the particulars in which the evidence failed to support the decision, since ownership of the land was one of probative facts essential to entitle the plaintiff to a vendor's lien. It would appear from the decision in Edelbuttel v. Darrell [139] to be insufficient specification to attack each finding seriatim without further explanation than a mere reference to several findings by number. In that case, the specifications were as follows: "First.—The finding of the court is not sustained by the evidence, and it is contrary thereto. Second.—The second finding is not sustained by the evidence, and it is contrary thereto. Third.—The finding is not sustained by the evidence, and is contrary thereto."

Undoubtedly, as was said in Leroy v. Rogers,[140] if a new trial is applied for on the ground that the findings of fact are against the evidence, the moving party should specify in his

to justify the decision, but the particulars in which it is insufficient are not pointed out. Therefore we cannot examine the evidence: De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791."

139 55 Cal. 277.

140 30 Cal. 229, 89 Am. Dec. 88. To same effect, Taylor v. Bell, 128 Cal. 306, 60 Pac. 853. In the second case, the court said: "In his notice of intention to move for a new trial the plaintiff stated as one of the grounds the insufficiency of the evidence to justify the findings and decision of the court. In the statement of the case the plaintiff specified the particulars in which the evidence was insufficient, as follows: 'The court erred in finding' (and then repeats the above finding 2, totidem verbis), 'but, on the contrary, the court should have found that the plaintiff was, on the first day of June, 1894, and up until the time of the sale, to wit, on or about the first day of December, 1895, entitled to the possession of the said personal property; that the said plaintiff has a good and valid lien and claim against the said personal property for storage that was reasonably worth twenty-five dollars per month during the said period from June 1, 1894, to December 1, 1895.' 'The court erred in finding' (and then repeats in exact language the above finding 3 of the court), 'but, on the contrary, the court should have found

statement each particular finding of fact which, in his opinion, is against the evidence, instead of stating in general terms that an alleged finding, which is the result of several facts found separately, is against the evidence. It often occurs that a finding covers more than one material fact, and where that is the case, a specification pointed merely at the finding, and not connected with a separate specification as to each such fact so contained in the finding would be too general. Thus, in Anthony v. Jillson,[141] the court said: "The finding designated as '4' contained three specific statements of fact; and this being the case, the mere designation of it by number, as not sustained by the evidence, was not sufficient as a specification."

The specifications above set forth in the case of Edelbuttel v. Durrell, are defective in form and are nothing more than a challenge of the correctness of the court's decision, and to go through the findings in that form is no better than to advance in one sentence the proposition that the decision is not sustained by the evidence. Among the findings in a case, however, there are usually some subsidiary to others—that is to say, findings of probative facts upon which rest more general findings, that is to say, findings of ultimate facts. In such case, there would seem to be no other course to pursue than to attack the specific

that on or about December 1, 1895, the said defendant willfully, maliciously, and unlawfully, broke into the warehouse of this plaintiff, and did forcibly and unlawfully take possession of and carry away, convert and dispose of to the defendant's use all of the personal property described in plaintiff's complaint.' The other specifications relate to the findings in a similar manner. These specifications fail to comply with the requirement of section 659 of the Code of Civil Procedure, that the statement shall specify the 'particulars' in which the evidence is alleged to be insufficient; and in the language of that section the statement was not entitled to be considered by the court at the hearing of the motion. What 'the court should have found' is only another mode of stating what 'the evidence shows' a form of specification which has been repeatedly held to be insufficient. Such specification is in effect only a statement that upon all the evidence the court should have come to a different conclusion, and is a mere repetition of what was previously stated in the notice of intention to move for a new trial."

141 83 Cal. 296, 299, 23 Pac. 419. See, also, Parker v. Reay, 76 Cal. 103, 105, 18 Pac. 124.

fact asserted in the subsidiary finding. It may be done by pointing out the fact, however, which is the more convenient and safer practice than a mere reference to the number of the finding which declares it to be a fact in the case.

On the other hand, care must be taken not to specify mere matters of evidence. The distinction to be observed herein is happily shown in an opinion by Temple, J., in Blake v. National Life Ins. Co.,[142] as follows: "A preliminary objection is made on the part of respondent that in defendant's motion for a new trial, there is 'no sufficient specification of the particulars in which the evidence is alleged to be insufficient.' The trial was by jury, which rendered a general verdict for plaintiff. It is said the jury must have found that defendant waived the payment and extended the time. This, it is contended, involved two propositions: authority on the part of the agent to waive the conditions, and the fact of waiver. But the verdict involved no finding in regard to the agent, but simply that the condition was waived by the corporation. The facts in regard to the agent are merely probative, showing through what means the defendant made the alleged waiver. The specifications are sufficient."

Since a recital of what the evidence "shows" is superfluous, the query naturally arises, How is one to frame a specification, where there is some evidence tending to establish a material fact, but it is either considered insufficient to justify the finding or it is so slight in comparison with overwhelming evidence the other way as to warrant a contention that there is no substantial conflict. This is the most difficult phase of the whole subject, for we have seen that where there is no evidence, it is sufficient to simply say so. Many forms have been employed, some criticised and held insufficient; others sanctioned and approved. Several further specifications which have been held by the supreme court to be sufficient as against objection will be given, from which it is believed a sufficient suggestion will be found to meet any condition likely to arise in practice, especially when joined to and considered in connection with illustrations which have preceded. Where, in an action of ejectment, the movant assailed the evidence in support of the plaintiff's owner-

142 123 Cal. 470, 56 Pac. 101.

ship (or title), that being, of course, the main issue, he specified that "the evidence is insufficient to justify the decision in this, that the complaint alleges that the plaintiff is owner in fee, while the evidence only shows that plaintiff had a contract to purchase the premises described in the complaint." It was held sufficient.[143] This case contains a suggestion which should profit those who follow it up.

The serious difficulties herein are apt to arise in connection with the use of such words as "owner." The assertion, whether in a pleading or finding, or otherwise, that one is the "owner" of property is the assertion of a conclusion of law, or the assertion of a conclusion of mixed law and fact, or of an ultimate or probative fact, according to the context.

There are numerous inconsistencies in the decisions which it would be both useless or difficult to harmonize. In a case where damages were sought for personal injuries, alleged to have been caused to the plaintiff through the negligence of an employee of the defendant in pushing him from one of its engines, the defendant specified that "the evidence was insufficient to show that the plaintiff was, by any servant or employee of the defendant negligently or carelessly pushed, shoved, forced or driven from said engine. On the contrary"—and here proceeded to state what the evidence established. As has been shown, upon repeated decisions of the same court, the part after the first sentence was superfluous. And upon the same authority, the first sentence was a mere challenge of the general verdict of the jury upon the whole issue. And yet the court approved the specification, saying: "It would be difficult to state in more specific terms the particular points of insufficiency on which the moving party proposed to rely in its proceeding for a new trial."[144] And indeed it would be difficult to do so, and the decision was correct barring the multifariousness of the specification.

143 Abbey Homestead Assn. v. Willard, 48 Cal. 614, 617.

144 Harnett v. Central Pac. R. R. Co., 78 Cal. 31, 20 Pac. 154, Compare with De Molera v. Martin, 120 Cal. 544, 547, 52 Pac. 825. Harnett v. R. R. Co., was cited with approval in Patten v. Hyde, 23 Mont. 23, 57 Pac. 407, with other cases decided subsequently to it in Montana.

None of the so-called rules declared by the courts are tests for all cases. If often happens that pleadings and findings are no more than assertions of probative facts; and it sometimes happens that they cannot be any different. When such is the case, these may be followed seriatim and in haec verba; but each should be assailed by a separate specification, and not in one as in the illustration just given. That case would only require, under pleadings and findings such as just described, that the disjunctive be used between all the elements which might by any possibility enter into a cause of action or defense and give or defeat a right of recovery. But a moment's reflection will disclose absurdities to which accepting and following that decision as a precedent would lead. A single specification would do for the most complicated case, with the free use of commas and of one little disjunctive word.

In Strasburger v. Beecher,[145] the specifications were all in a single paragraph and in a single sentence, the clauses of which were separated by semicolons, the conjunction "and" being used to connect them, and the specifications were held sufficient; but each clause directed a charge of insufficiency at a separate material probative fact. The approved specifications in this case are instructive on a point which often puzzles the practitioner who thinks that his evidence establishes a fact, and the court has made a finding against him. The first impulse, and one that is very natural, is toward specifying that the fact found, mentioning it, is against or contrary to the evidence, and then proceed to state what the evidence "shows" or "establishes." But this we have seen to be useless and superfluous. In the case just mentioned, the plaintiff was movant and appellant. The action was between rival claimants to mining property. The defendant alleged forfeiture of rights by plaintiff for failure to perform the conditions required by the federal laws to entitle plaintiff to a patent. The burden of proof being on plaintiff who introduced considerable evidence at the trial and the finding being against him, the question as to the sufficiency of this evidence was squarely before the court at the hearing of the motion. But what his evidence was, and what it showed

145 20 Mont. 143, 145, 49 Pac. 740.

or proved, was matter for argument, and had no place in the specifications. The approved specifications were as follows: "The evidence was insufficient to prove, and the defendant did not allege nor prove in any manner, that less than one hundred dollars' worth of labor had been performed and improvements made during each and every year upon Lake Superior mining claim, from the time of the location thereof, in the year 1882, to the time of the commencement of this action by the plaintiffs, their grantors and predecessors in interest, or any of them; and the evidence was insufficient to prove, and the defendant did not allege nor show, any failure on the part of the plaintiffs, or any of them, or their grantors or predecessors in interest or either of them, to comply with the conditions that one hundred dollars' worth of labor should be performed and improvements made during each year upon Lake Superior claim," etc.

And it may be generally stated that it makes no difference, either as to the form or substance of a specification, whether the party stand in court for an affirmative proposition which he believes he has supported by evidence, and the finding has been against him, or against such proposition with a like adverse finding. In either case, he selects the material fact or facts which have been found against him and specifies the finding or verdict upon it or them not to be supported by any or by sufficient evidence.

But there is this difference between the position of a losing party who stood for an affirmative proposition and one holding the negative of that proposition on the record. The former must specify insufficiency as to every material fact found against him, and make good as to all, while, if the latter correctly specifies only one and makes good on that, he prevails, regardless of the merits of the verdict or decision on the others.

A disposition to be less exacting and critical with respect to specifications of insufficiency is indicated by the effect no less than the spirit of later decisions. In an opinion by Justice Temple in American Type etc. Co. v. Packer [146] there is something stronger than an intimation that the matter should not

146 130 Cal. 459, 62 Pac. 744.

be dealt with as purely a question of law concurrently by the trial and appellate court, but that something should be deferred to the action of the former. In other words, that where the specification has been treated as sufficient, and acted upon by the trial court, and not disregarded, its action must be palpably erroneous to warrant the supreme court in refusing to examine the point. Speaking to an objection to the specification in that case, the learned justice said: "The requirement of the statute is for the benefit of the opposing party and to abbreviate the statement. If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough. The statute in this matter is not primarily for this court, but for the trial court. That court should not hear the motion unless the statement contains such specifications. Upon that subject, the trial judge, who tried the case, has a decided advantage over this court in determining whether the specifications are sufficient. In many of the cases the specification seems to have been regarded as a pleading—as a sort of complaint in error—where all the intendments are against the pleader, and the moving party is not even allowed the benefit of the rule that errors shall be disregarded if we can see that injury has not been done. Plainly, this is not correct. It is in the nature of a notice, the sufficiency of which should be tested by inquiring whether the opposite party is injured by the defect. It is not even to be regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party and in a matter in which great liberality should be exercised by courts. Whenever there is a reasonably successful effort to state 'the particulars,' and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, in my opinion, this court ought not to refuse to consider the case appealed, and especially where, as in this case, the transcript shows that all the evidence has been brought up." This decision cannot, however, stand the test of logical attack. The question of what is a sufficient specification is not a question of discretion, but is a legal question, just like the question of what constitutes legal notice, which the specification is intended to be, as often de-

cided by the same court. To say that a party can be in this way deprived of the notice which, the statute declares, he shall have, if carried to its logical end, would deprive him of any notice at all. Of course, the necessity for specifications of some proper kind cannot be dispensed with by the appellate, any more than by the trial, court. And a decision was rendered in a still later case,[147] which evinces an intention on the part of the court to carry out in practice the liberal declarations of the court in the case last cited. The decision, if to be regarded as a binding precedent, will constitute something of an innovation. The appeal was from an order denying a new trial, in an action to quiet title. The findings objected to were of a most general character, affirming and negativing ownership by the respective parties. The specifications merely challenged the findings as unsupported by the evidence. The court held them sufficient, reasoning thus: "The purpose of the statute in requiring such specifications is, as has been frequently said, that the opposing party may propose amendments to the statement, and thus cause it to contain all the evidence in support of the decision which he may deem pertinent or relevant thereto; but where, as in the present case, the statement recites that it 'contains all the testimony which was offered by either party and admitted in the case,' the respondent has no ground for saying that, if the particulars had been more specifically pointed out, he might have caused it to appear that there was additional evidence in support of the decision. The object of requiring any specification is to give notice to the opposing party of the grounds relied on for setting aside the decision; but if, under the notice which is given, the respondent has accomplished all which could have been accomplished under any notice, he is not in a position to object to any defect in the notice." It is impossible to reconcile these decisions with what otherwise appears to be well settled by prior decisions of the same court.

147 Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 124, 64 Pac. 113. In Bledsoe v. Decrow, 132 Cal. 312, 316, 64 Pac. 397, the fact that the specification appeared to have had the effect of getting all the evidence into the statement was mentioned, though the specification should have been held sufficient without such extraneous aid.

It has been often held that the trial judge has no discretion under the code, but must disregard a statement which omits sufficient specifications of particulars. Under this decision, the "particulars" mentioned in the code are, or may, by the parties, or the trial judge, made to be, a mere synonym for the findings. The last-mentioned decision permits the trial judge to do just what has so often been decided he cannot do—namely, relieve the movant of the duty and task of making specifications, by merely inserting in the statement words expressing what many prior decisions have declared to be a legal presumption. The latter decision makes the task of the party proposing the statement an idle and purposeless formality, and the court might just as well have said the code requirement was a misprint or no longer operative. If the movant may merely follow the findings, it is wholly immaterial by what form of language he does it. He may say that "findings 1, 2, 3," etc., are not supported, or that "none of the findings are supported" by the evidence, which is the equivalent of saying that the decision is not supported. It is impossible to see any justification for this decision in the fact that the statement gives testimony for itself, that it "contains all the testimony which was offered by either party and admitted in the case." The statement is not a product of the opposition to the motion, and it is obviously unfair to him to permit the movant to veil his attack upon the decision by merely "stuffing" the statement with all the evidence in the case. To prevent this is the expressed purpose of the code provision on the subject.[148] As previously stated in this section, it often happens that the scope of a finding may be so narrow as to warrant that which it contains being covered by a single specification, but it is much oftener otherwise; and it is submitted that to accept the doctrine of the latter of the last two mentioned cases as a settled rule of practice would effect a nullification of the code provision, or at least a radical infringement of its spirit and purpose.

148 See Cal. Code Civ. Proc., § 659, subd. 3, requiring specifications and striking out of superflous matter in statements; also section 650 containing the same requirement as to redundant matter in bill of exception.

The same rule applies in equity cases as in others. If special issues, or even all the issues, be submitted to a jury, their verdict may be ignored. Even if the court adopt the verdict in toto and no issues remain to be disposed of by the court, the decision is by the court and the facts essential to be found are those of the court, either express or implied. In Cummings v. Ross[149] the court said: "The setting aside of the judgment upon the verdict in an equity case, which judgment had been inadvertently entered by the clerk, without judicial sanction, and when the other issues of fact remained yet to be determined by the court, and the trial of those issues upon the evidence introduced, the adoption of the advisory verdict and finding thereon, and the other issues, was proper, and as no error appears in the records, we advise that the judgment and order be affirmed."

It is not only important to know what is a sufficient specification to obtain a re-examination as to a fact passed upon, but it is also important to know the scope of specifications when presented. Herein it is better to err in the direction of too many than too few. An illustration of a refusal of the court to review the evidence for lack of a specification covering the particular point is found in Williams v. Dennison,[150] where the point of attack was insufficiency of evidence to sustain fraud set up by plaintiff in answer to the plea of the statute of limitations, and the only specification was as to the nonpayment of any money within two years.

In some cases counsel have fallen into the error of so commingling with what they intended as a specification of insufficiency such positive criticism of the finding as "error in law" as rendered the specification wholly insufficient for their purpose. The case of Bardwell v. Anderson[151] fairly illus-

149 90 Cal. 68, 71, 27 Pac. 62.

150 94 Cal. 540, 543, 29 Pac. 946. See, also, Rauer v. Fay, 128 Cal. 523, 61 Pac. 90, where a movant plaintiff failed to insert specifications covering affirmative defenses, and as a consequence the supreme court refused to investigate as to sufficiency or insufficiency.

151 18 Mont. 528, 46 Pac. 443. See, also, Smith v. Christian, 47 Cal. 18; Heilbron v. Kings River Ditch Co., 76 Cal. 11, 17 Pac. 933; Nichols v. Jones, 14 Colo. 61, 23 Pac. 89; Cunnington v. Scott, 4 Utah, 446, 11 Pac. 578.

trates, and the court in the same case clearly expresses, what is here meant. One of the so-called specifications was in these words: "The court erred in finding that F. M. Morgan was in any way incapacitated from making a contract with H. A. Anderson, the contractor, to furnish the materials described in plaintiff's complaint to the Collins and Lepley building, by reason of any relation existing between him and Collins and Lepley, the defendants; and the evidence herein fails wholly to sustain the finding of the court in this particular." Of this the court said: "This purports to be a specification of an error of law. It is not an error of law at all. The petitioner is complaining that the court found that which he stated the evidence wholly fails to sustain. In so finding, if there is any cause for complaint, it is not that there was any error of law, but, on the other hand, it would be that evidence did not sustain the finding." After citing code provisions and authorities, the court proceeded to say: "Applying these principles to the specification before us, we find that it is wholly insufficient as a specification of an error of law, because it does not describe in any way an error of law. If the court were inclined to take a loose view of the subject, and say that, while the counsel has pretended to specify an error of law, we will still consider his language as a specification of insufficiency of the evidence, even then the specification would be wholly bad, for the reason that it simply states, 'The evidence herein fails wholly to sustain the finding of the court in this particular,' This would be bad even as a specification of insufficiency." And in Smith v. Christian,[152] where there was a similar abortive attempt at specification, the court said: "These specifications cannot be considered to be specifications of the particulars in which the evidence was insufficient, because they are not stated to be such; on the contrary, they are expressly set forth as being errors of law—'particulars in which the court erred.' But it is clear that the matters thus set forth do not constitute errors of law. It is not an error of law that the evidence is insufficient to justify a particular finding of fact. If the finding had been by a jury impaneled in the

152 47 Cal. 18. To same effect Kumle v. Grand Lodge, A. O. U. W., 110 Cal. 204, 42 Pac. 634.

cause, probably no one would pretend that the finding could be assailed as being an error of law. We are not aware of any distinction made by the statute in this respect between the verdict of a jury and the finding of the court sitting as a jury."

The failure to distinguish between insufficiency of evidence and the objection that the verdict or other decision is "against law" has sometimes led to failure in proper specification. But where the specifications in a bill of exceptions used on a motion for new trial include a double statement that the evidence is insufficient to justify the decision, and that the decision is against law in the particulars specified, the ambiguity is removed where the particulars stated show that the objection is to the insufficiency of the evidence.[153]

§ 435. Sufficiency of specifications—Errors.

It is proper again to call attention to the difference, as regards specifications of errors, between statements and bills of exceptions.[154] Such separate specification is required in the former but not in the latter.[155] But while not required in bills of exceptions, yet their insertion facilitates the review whether on motion for a new trial, or on appeal, and is recommended. The necessity for such specification in the statement has been fully explained.[156] It only remains to consider their form and sufficiency. "When the notice designates, as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will

153 Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102.

154 See ante, §§ 423, 433. Specifications no longer required in North Dakota: Farmers' etc. Bank v. Davis, 8 N. Dak. 83, 76 N. W. 998. See under former rule, Thompson v. Cunningham, 6 N. Dak. 426, 71 N. W. 128.

155 Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Ackley v. Fishbeck, 124 Cal. 409, 57 Pac. 207; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84.

156 See ante, §§ 423, 433; Roberts v. Webster, 25 Nev. 94, 57 Pac. 180, 58 Pac. 411.

rely."[157] The "particular errors" must be specified in the statement, the general ground having been stated in the notice. Or, as judicially expressed, the statement "must particularly designate the errors relied on."[158] The specification of errors is a very simple matter when compared to that of insufficiency of evidence. The party simply states that the court erred in this, that, or the other ruling, briefly designating it. It is useless to designate any errors which have not been excepted to or which are not legally deemed to have been excepted to.[159] The record of the errors relied on will appear scattered through the statement; and it is a convenient and commendable practice to go through the statement before preparing the specifications and number such exceptions as were expressly reserved or saved by legal presumption and are relied upon consecutively. This being done the specification, though shortened, yet is better in every respect. It may be in this form: "1. The court erred in admitting in evidence the deed from John Brown to plaintiff (exception 1). 2. The court erred in giving instruction numbered 1 to the jury (exception 2)," etc. This method will save much repetition and circumlocution both in the statement and in briefs subsequently prepared on appeal. The particular point to be developed by argument is in the body of the statement, the essentials of which are shown under the various kinds of error upon which the motion may be based, elsewhere discussed.[160]

Objections made at the time an exception is taken need not be repeated in the specification.[161] There must be enough

157 Cal. Code Civ. Proc., § 659, subd. 3.

158 Caldwell v. Greely, 5 Nev. 258; McWilliams v. Herschman, 5 Nev. 263; People v. Central Pac. R. Co., 43 Cal. 398; Leonard v. Shaw, 114 Cal. 69, Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258. The statement should point out in an "intelligent manner" the specific errors relied on: Pinney v. Hershfield, 1 Mont. 367.

159 See ante, § 432; post, § 671.

160 For error during impanelment of jury, chapter 14; for error in admitting and refusing to admit evidence, chapter 15; for error in giving and refusing instructions, chapter 16; for error in granting or denying motion for nonsuit, chapter 17.

161 State v. Noland, 111 Mo. 473, 19 S. W. 715. In some states the specification is required to go somewhat into details. Thus in

to fix attention of the court and opposite party upon the point intended to be made. And it was held that a specification of errors in a statement on motion for a new trial that they are "pointed out and designated in the foregoing transcript by exceptions Nos. 1, 2, 3, etc., to 25, and that the court erred in each of its said rulings" was not such a specification of particular errors as the statute requires, and was especially defective where it appeared that the exceptions were not numbered in the transcript.[162]

The form of exception to written instructions is very simple. The specification need not be any more elaborate than the exception. Each instruction the giving or refusal to give which is relied upon as error should, however, be in some way differentiated from all others so objected to in the specifications as in the body of the statement.[163]

§ 436. Exceptions before referee—How shown.

As to the proper procedure as a foundation for the correction of error where exceptions are taken before a referee, much will depend upon the character or scope of the reference. The California Code of Civil Procedure contains several provisions in relation to references and referees.[164]

The provisions of the Practice Act[165] were substantially different from those of the code; and as a consequence, numerous early decisions (a consideration of which is considered

Georgia a ground of a motion for a new trial, merely alleging that "the court erred in causing to be withheld from the jury" certain documentary evidence, without indicating that it was "illegally withheld from the jury against the demand of the applicant," was held not to contain a sufficient assignment of error: Powder v. Walker, 107 Ga. 753, 33 S. E. 690. See, also, Baker v. State, 97 Ga. 351, 23 S. E. 830. To same effect, Sheffield v. State, 97 Ga. 426, 24 S. E. 143.

162 Hall v. Susskind, 120 Cal. 559, 53 Pac. 46.

163 See ante, § 330. A study and comparison of Mariana v. Dougherty, 46 Cal. 27, and Benjamin v. Stewart, 61 Cal. 605, will prove instructive on questions of specifications of errors in damage cases: See Livermore v. Stine, 43 Cal. 274.

164 §§ 638, 639, 644, 670.

165 § 187.

unnecessary) were antiquated by the adoption of the code. One or two decisions subsequent to the new procedure have been criticised or rather shown to have been misleading, for the reason that the charge was not noted.[166]

The term "report" used in the Practice Act sometimes meant a finding and in other instances had a different meaning, depending upon the nature and scope of the reference. The various kinds of reference are separately specified in the code.[167] The finding of a referee upon the whole issue must stand as the finding of the court, and judgment may be entered thereon.[168] This must be the finding referred to in the third subdivision of section 670 of the Code of Civil Procedure, and constitutes a part of the judgment-roll. The proceedings before a referee under such an order are "quoad" those of the court, and a bill of exceptions, or statement, containing his rulings upon evidence when settled, allowed and filed constitute part of the judgment-roll and record on appeal, and may be, when settled according to the provisions governing therein, used on a motion for a new trial, with the same force and effect as if the trial were had before the court.[169]

The various steps are to be taken as if the trial had been directly by the court, such referee being merely the hand of the court.

§ 437. Whether specification required where "decision against law."

That a verdict or decision is against law is a distinct ground for a new trial, though designated in the same subdivision of the statute with another ground, is too well settled upon authority to require further discussion.[170] To obtain a review

166 See Thompson v. Patterson, 54 Cal. 542; noticed in Faulkner v. Hendy, 103 Cal. 15, 20, 36 Pac. 1021.

167 See Cal. Code Civ. Proc., § 639.

168 See Cal. Code Civ. Proc., § 44.

169 See Branger v. Chevalier, 9 Cal. 353.

170 See ante, §§ 250-254; Brummagin v. Bradshaw, 39 Cal. 24; Knight v. Roche, 56 Cal. 15; Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; Brison v. Brison, 90 Cal. 328, 27 Pac. 186.

where that is a ground relied upon on motion for new trial, it must have been specified in the notice of intention.[171] In some states it appears to have been held necessary to specify in the assignment of errors wherein the decision is against law; in other words, that the mere designation of that as one of the grounds is insufficient.[172] But no such construction can be given the section of the California code on the subject, but rather the contrary, according to the doctrine of "Expressio unius, alterior excludit." If that be designated as a ground for the motion in the same sentence with insufficiency, and the particulars of insufficiency be specified, any ambiguity resulting from so combining them is removed, and the latter ground will be considered.[173] And no doubt the informality of such combination would be overlooked and the former considered if relied upon, though there appears to have been no decision on the point. It is better practice to designate the grounds separately. If the basis for the assignment "against law" be in a special verdict or findings omitting to find upon material issues, such basis will, of course, be found in the judg-

171 Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; State v. McKinnon, 8 Or. 488.

172 See State v. McKinnon, 8 Or. 488; Napier v. Burkett, 113 Ga. 607, 38 S. E. 941.

173 Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102. In this case Chief Justice Beatty, delivering the opinion, said: "The plaintiff in framing his bill of exceptions prefaced his specifications with this statement: 'Plaintiff says that the evidence introduced on said trial is insufficient to support said decision, and said decision is against law in the following particulars.' The respondent claims that because this statement embraces two distinct grounds of motion he was not apprised by the following specifications whether the attack upon the decision was on the ground of insufficiency of the evidence to sustain it, or on the ground that it was against law. But we think that whatever view may be taken as to the distinction between a decision against evidence and a decision against law, and however ambiguous the expression above quoted may be held to be, the specifications by which it was followed in this bill of exceptions were amply sufficient to remove the ambiguity, and apprise the defendant that the real ground of attack upon the decision was insufficiency of the evidence to justify the findings of the court, to the effect that he was a bona fide purchaser without notice and for a valuable consideration."

ment-roll; if in disobedience of instructions by the jury, the instructions should appear in the statement or bill. It is proper here to call attention to the language of the court in Thompson v. Los Angeles,[174] and to point out its error. The court said: "Appellants, in their brief, say that the ground for a new trial more particularly relied upon for a reversal is that 'said decision is against law'; and proceed to discuss the evidence as though its sufficiency or insufficiency was the sole question to be considered. But since, in the absence of specifications, we are obliged to conclude that the findings are justified by the evidence and that no errors of law occurred upon the trial, if 'the decision is against law' it must be for some reason appearing only in the judgment-roll, as, for example, a failure to find upon some material issue, or that wrong conclusions of law have been drawn from the findings. There is no appeal from the judgment however, and upon appeal from an order denying a new trial errors upon the face of the judgment-roll cannot be considered. Besides, counsel for appellant does not in his brief suggest any error of law appearing upon the judgment-roll." If the jury disobeyed instructions, that would not appear in the judgment-roll in a civil case. There is no legal justification for, or relevancy in, the last two sentences of the above quotation. They can only be accounted for upon the theory that the court confounded "error in law" and "against law." While it is true that on appeal from an order on motion for new trial errors in the judgment-roll cannot be considered as grounds for the motion unless designated in the notice, or motion, yet in the very instance specified of a failure to find on a material issue there is nothing that can be looked to for a determination of the question raised by the specification. The court says: "But since . . . . if 'the decision is against law' it must be for some reason appearing only in the judgment-roll, as, for example, a failure to find upon some material issue, or that wrong conclusions of law have been drawn from the findings." That a wrong conclusion of law drawn from findings does not constitute "decision against law" has been so often decided that the saying has become trite. The authorities cited in the opinion, lend no support whatever to the above extract.

174 125 Cal. 270, 57 Pac. 1015.

§ 438. When action of court pertaining to amendments to be specified as error.

If attention be paid to technical correctness, it is doubtful if all refusals to allow amendments of pleadings should be specified under subdivision 1 of the section.[175] The supreme court has on several occasions designated such action of the trial court as "error," while generally speaking of it as "abuse of discretion." Where, for instance, the right given by section 472 to amend the complaint once as of course is denied a plaintiff upon sustaining a demurrer, it appearing that the objections of defendant may be thereby obviated, it would appear that the court had mistaken the legal right of the party, and erred in law rather than abused its discretion. And the same may be said when the court denies a defendant the right to file an amended answer to an amended complaint. This proposition was clearly recognized in Morton v. Bartning,[176] where the motion for a new trial was made upon the ground that the evidence did not justify the decision, and of errors of law occurring at the trial, among which was specified the refusal to allow the amendments to the answer. After granting the motion, the court filled a written opinion, in which it is said: "The only error committed by the court on the trial herein, in my opinion, was in refusing to allow the defendant to file the plea of the statute of limitations on the trial. The defendants should have been permitted to plead the statute of limitations to the amendment to the complaint, alleging the verbal promise." In affirming the order granting a new trial the supreme court said: "It is now claimed for the appellant that the court erred in granting the new trial, for the reason that the application to amend the answer was addressed to the discretion of the court, and the exercise of that discretion could not become or be assigned as an error in law. There can be no question that the general rule is, as stated by counsel, that the plea of the statute of limitations is not favored by the courts, and where a party omits to plead the statute, and goes to trial without doing so, although the claim

175 Cal. Code Civ. Proc., § 657.

176 68 Cal. 306, 308, 9 Pac. 146.

proved against him is clearly barred on its face, he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea. But the rule invoked has no application in this case. Here the plaintiff, during the trial, amended his complaint, and the defendant then had a right to amend his answer, and his application to be permitted to do so was not addressed to the discretion of the court. Nor do we think the amendment was rightfully refused, as claimed for the appellant, because it was a plea to the 'plaintiff's cause of action,' and not to the alleged verbal promise alone. It was not refused for that reason, but because it came too late. The plaintiff's cause of action was a supposed right to recover from the defendant the amount of money claimed to be due to him, and was rested upon an alleged written promise, and verbal promise to pay it. When, therefore, the plaintiff by his amendment gave the defendant the right to amend, we see no reason why he might not make his amendment as broad as he did make it." The specification in such case should briefly but clearly designate the ruling. The body of the statement should show the amendment proposed and an exception.

It would probably be a correct statement of a general proposition that the specification as error of denial of a statutory right to amend will insure consideration of the point; but until better settled by repeated decisions the better method is to treat it both as an error and an abuse of discretion.

§ 439. Sufficiency of specification as to amount of recovery on contract.

Some reference has been already made to differences in the form of specification dependent upon whether the action is in tort or upon contract. The importance of the matter justifies further and special notice. In some states—one of which is Indiana—the matter has been considered to be of sufficient importance to justify the additional ground for a new trial having special reference to the amount of recovery upon contract; but the correct practice is substantially the same under the usual practice and civil procedure acts, with or without such separate ground, being expressed.

It is, of course, essential to the value of any specification that the proper head, or ground, be contained in the notice, and that the specification correspond. A specification under one subdivision of a statute, when the objection aimed at comes under another, is exactly equivalent to no specification at all. For instance, when the statute provided a fifth cause for a new trial, viz., "error in the assessment of the amount of recovery, where the action is upon contract," and in an action on a sheriff's bond for breach thereof, the movant assigned for ground of new trial the fourth cause, viz., excessive damages, it was held that he had not called in question the assessment of the amount of recovery, as the action was upon contract.[177] And under the same statutory provision it was held that when the defendant pleads offsets, and there must be a judgment for plaintiff for some amount, even if all the offsets were allowed, the question as to the correctness of a judgment for plaintiff could be raised by defendant on a motion for a new trial only by an assignment directly assailing the amount of recovery, and such question was not raised by assignments, that "the decision is contrary to the evidence," and "is not sustained by sufficient evidence." [178]

§ 440. Proper place for specification—Must form part of statement or bill of exceptions.

It is not essential that the specifications should be in any particular place in the statement; but it is necessary that they be made a part of it, that is embodied therein. It is usual, however, to insert them last before the judge's certificate.

A paper printed in the record on appeal, which appears to be a copy of certain specifications as to alleged insufficiency, but which is not made part of the statement, and is wholly without authentication, and signed by the appellant's attorneys only, cannot be considered as part of the statement or rec-

177 Moore v. State, 114 Ind. 414, 16 N. E. 836; Ind. Rev. Stats. 1881, § 559. See, also, Bluffton etc. Ice Co. v. Richardson, 25 Ind. App. 263, 57 N. E. 265; Wachsmuth v. Orient Ins. Co. 49 Neb. 590, 68 N. W. 935.

178 Cox v. Bank of Westfield, 18 Ind. App. 248, 47 N. E. 841.

ord.[179] Nevertheless, the specification is the act of the attorney, proposing the statement, and the certificate has no other effect than to identify it as part of the statement.

Where the motion is made on the minutes, the notice, as previously explained, contains the specifications.[180]

In making up the statement, whether before or after the hearing, it is improper practice to insert the notice therein, in lieu of the specifications required by the statute. And the same is true if a bill of exceptions is prepared instead of a statement. Under the California practice, the notice is not one of the papers designated either to be used on the motion or to be furnished the supreme court on appeal. The specifications required to be in the statement are a distinct matter from those contained in the notice, notwithstanding that they may be the same in substance, or even the former a literal transcription of the latter.[181] If the notice be inserted, and it appear therefrom that the notice was insufficient, the objection may be made in the supreme court to a consideration of

179 O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950. See, also, Henry v. Maher, 6 N. Dak. 413, 71 N. W. 127.

180 See ante, §§ 368, 423. See, also, next section. See, also, Schneider v. Market St. Ry. Co., 134 Cal. 483, 66 Pac. 734, which appears to settle another question which had not been previously passed upon, namely, that the argument of the points will be presumed without a statement to that effect in the statement. The court says: "And when specifications are set out in the statement, it will be presumed, without a formal statement to that effect, that they were contained in the notice, and that they were in fact argued."

181 See Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Leonard v. Shaw, 114 Cal. 72, 45 Pac. 1012. See, also, Pico v. Cohn, 78 Cal. 384, 20 Pac. 706. The rule is different in Montana. See post, § 441. The facts and views of the court in the first of these cases are of value and interest, in view of the frequency with which the same mistakes have been made, and are liable to again occur. They appear in the following excerpt from the opinion: "The transcript contains what purports to be minutes of the court, to show that on April 10th, the parties being present, plaintiff by his attorneys and defendant in person, plaintiff moved the court to set aside the decision rendered March 20th, wherein judgment was given, and to grant plaintiff a new trial upon the grounds stated in the notice. The motion was made upon the minutes of the court, the record in

the statement in review of the order on the motion, as was done in a recent case.[182]

It is not necessary to mention the subject of notice of intention in the statement, in so far as concerns the movant. In the absence of any mention of it, it will be presumed that

the case, and evidence taken. Motion was denied, and plaintiff excepted and served notice of appeal April 17th. This part of the record (except notice of appeal) is not authenticated in any manner except by the clerk's certificate at the end of the statement, and follows immediately after the judgment-roll in the transcript. Then follows the statement, which was settled by the judge September 11, 1896. In the statement there is no copy of the notice of motion or its specifications, and no copy of the motion itself, and no reference made to them, and no specifications of error in any form. The statement contains only the evidence introduced at the trial and the rulings of the court as they there occurred, the notice of appeal and the clerk's certificate. The question is, Can this court look beyond the judgment-roll and the statement, and consider the motion and the grounds stated therein and the specifications found with the notice of motion? These questions, we think, are answered in the negative in Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012. There, as here, there was a failure to embody in the statement any specifications whatever of the errors or particular reasons on which the moving party relied, and it was held that the motion could not be considered. The clerk certified, among other things, in the case now here, that certain original documents were of record and on file in his office 'in said entitled case, ... to wit, judgment-roll, notice of motion for new trial, order of court denying said motion, statement on appeal and service thereof.' We do not think the clerk can supply by certificate what the law requires should be made to appear in the statement. The judge settles the statement, and in this case he certified to its correctness as it appears in the transcript. The clerk has no power to add to or take from that statement as thus settled."

182 Reclamation Dist. v. Thisby, 131 Cal. 572, 63 Pac. 918. This case fully illustrated the proposition of the text and contains valuable suggestions. The court said: "The notice of intention to move for a new trial does not form part of the record on appeal, and need not be incorporated in the statement therefor (Pico v. Cohn, 78 Cal. 384, 20 Pac. 706); and it has been held, for the purpose of sustaining the action of the court below, that where the record is silent upon the subject it will be assumed that the notice was given within the proper time (Patrick v. Morse, 64 Cal. 462, 2 Pac. 49); yet if the notice is in fact set forth in the statement of bill of exceptions, and it appears therefrom that it was either insufficient or

it was given in proper time and that it was sufficient.[183] This rule applies equally whether the order appealed from was made on the statement of the case, or bill of exceptions previously prepared, or on the minutes of the court. And when specifications are set out in the statement, it will be presumed, without a formal statement to that effect, that they were contained in the notice, and that they were in fact argued.[184] And the same rule would undoubtedly be held to apply if a bill of exceptions were used instead of a statement.

§ 441. Effect of inserting notice in statement or bill.

In California, the notice of intention has no place in the statement.[185] Nor if, by inadvertence or otherwise, it be

not given within the proper time, it then becomes necessary for the appellant to have it appear by the record that this defect was overcome or waived. There is nothing in the record herein from which it can be held that the respondent waived this objection to hearing the motion for a new trial, and it may be assumed, in support of the order, that it was made in consideration of the fact that the proper notice had not been given. The statement in the bill of exceptions that the appellants served and filed the notices of their intentions to move for a new trial, 'within the time allowed by law,' is but a legal conclusion, and is overcome by the fact that the date of such service and filing is itself given in the bill of exceptions. It does not appear that the respondent accepted service of either the notice of intention, or of the proposed statement and bill of exceptions, or that it suggested any amendments thereto, or was present at the settlement: See Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773.''

183 Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Reclamation Dist. v. Thisby, 131 Cal. 572, 63 Pac. 918.

184 Schneider v. Market St. Ry. Co., 134 Cal. 482, 484, 66 Pac. 734. The specification of the particular errors upon which the moving party will rely, although an essential part of the statement, is the act of the attorney, annexed to the statement or bill of exceptions, for the purpose of pointing out particulars in which errors were committed at the trial: Braverman v. Fresno Canal & Irrigation Co., 101 Cal. 644, 36 Pac. 386.

185 Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Reclamation Dist. v. Thisby; Ferrer v. Home Mut. Life Ins. Co., 47 Cal. 416, 427. These cases hold, as have been often decided, that the specifications are something separate and apart from the notice. See, also, Spencer v. Long, 39 Cal. 703.

inserted, can it be used as a substitute for the specifications required by law. The notice has no place in the statement for the purpose of showing the general grounds of the motion, for these are not required to appear in a statement or bill of exceptions.[186] It is otherwise in Montana where the statement must contain the notice or show a waiver of it.[187] The movant, last of all, should insist upon its insertion. When inserted, if it appears to be defective or not given in proper time, it devolves upon the moving party to show that the defect was overcome or waived, else it will be assumed in support of an order denying a new trial, that it was denied upon the ground that the proper notice had not in fact been given.[188] If the notice be not inserted in the statement or bill of exceptions, and the record is silent upon the subject, it will be assumed that the notice was given within the proper time.[189] And where the notice was inserted and showed that it had been given prematurely, it was held fatal to the motion on appeal, although there also appeared in the bill of exceptions a statement that it had been served and filed within the time allowed by law.[190] The foregoing has special reference to statements prepared before the hearing and used on the motion. But the same rule applies when the motion is noticed and heard on the minutes, notwithstanding

186 Worthing v. Cutts, 8 Nev. 118; Leonard v. Shaw, 114 Cal. 71, 45 Pac. 1012. But see Dawes v. Powers, 5 Mont. 59, 1 Pac. 421, holding that when the notice of a motion for a new trial contains a specific assignment of error, and this notice is made part of the statement on motion for a new trial, it is sufficient compliance with the requirement of the Practice Act for a specification of error in the statement.

187 Grinnell v. Davis, 20 Mont. 222, 50 Pac. 556; Harrigan v. Lynch, 21 Mont. 42, 52 Pac. 642.

188 Reclamation Dist. No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918.

189 Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734.

190 Reclamation Dist. v. Thisby, 131 Cal. 572, 575, 63 Pac. 918, where the court said of the statement of service and filing within the time allowed by law, that it was but a legal conclusion and was overcome by the fact that the date of such service and filing was itself given in the bill.

a practice which has grown up and received countenance in the courts of incorporating the notice in the statement and referring to it as containing the specifications or points argued at the hearing.[191] In Leonard v. Shaw,[192] where the motion was made and heard on the minutes, and the case was brought up on a statement prepared and settled after the motion was heard and decided, the court recognized that such had been the practice, but said: "A better practice is to make a formal statement of the causes relied upon and argued at the hearing, as it is only the formal objections stated in the notice and argued at the hearing of the motion that are entitled to be included in the statement." It will be seen by reference to the code[193] that this is an express provision.

But it is not necessary for the statement to recite, or show in any way that the points contained in the specifications were argued when the motion was made on the minutes and the statement afterwards prepared. It will be presumed that they were contained in the notice and that they were argued.[194]

§ 442. Authentication.

There were numerous amendments to the California Practice Act in force prior to the adoption of the Civil Procedure Act relating to the authentication and certification, statement, and bill of exceptions, and there is a long line of decisions construing the statute and explaining the effect of these amendments and the proper practice thereunder. However much learning has been displayed in pursuing the obscure path of judicial and legislative history during that period, it is here deemed best to ignore it all, and devote the space thus spared to more useful purposes. The California code provision on the subject is not materially different from that of many or nearly all other states, and provides but one method for authenticating bills and statements. Prior to the code the

191 Schneider v. Market St. Ry. Co., 134 Cal. 483, 66 Pac. 734.

192 114 Cal. 69, 45 Pac. 1012.

193 Cal. Code Civ. Proc., § 661.

194 Schneider v. Market St. Ry. Co., 134 Cal. 483, 66 Pac. 734. See, also, Leonard v. Shaw, 114 Cal. 72, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 574, 55 Pac. 419.

signature and certificate of the trial judge might be dispensed with by stipulation; but the code provides that "when settled, the statement shall be signed by the judge or referee with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.[195] And exactly the same provision is made as to bills of exceptions.[196]

195 Cal. Code Civ. Proc., § 659, subd. 3. A motion to strike out a statement of facts, because settled by a judge after his term of office had expired, will be denied, where a certificate was procured from his successor as well: Raub v. Scholl, 19 Wash. 30, 52 Pac. 332.

196 Turner v. Hearst, 115 Cal. 394, 398, 47 Pac. 129. See, also, Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903; Tregambo v. Comanche etc. Co., 57 Cal. 501. The fact that a statement of facts was certified by one of the judges of the superior court, while the action was tried by such judge as a judge pro tempore, before he succeeded to the office, would not be ground for striking the statement, since it fully meets the requirement of having been certified by the judge who tried the cause: Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879. See, also, Anderson v. Providence Life & Trust Co., 26 Wash. 192, 66 Pac. 415. The facts and view of the court on this point in the first case cited above are instructive. The court said: "Certain denials of the answer were, upon plaintiff's motion stricken out. The ruling and decision on motion to strike out were made by the Honorable C. W. Slack. The trial was had before the Honorable W. R. Daingerfield. The bill of exceptions on appeal from the judgment, which was also the statement used upon motion for a new trial, was presented to and settled by Judge Daingerfield Objection is here made to reviewing the order of Judge Slack in striking out portions of the defendant's answer, upon the ground that the bill containing the exception to this ruling and decision should have been presented to and settled by Judge Slack, who made the order. The objection is well taken. It is the duty of a litigant desiring to have a ruling or decision reviewed to present the bill of exceptions, embodying the matters excepted to, to the judge who made the ruling or decision, for settlement by him: Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903. That judge alone can know the facts upon which he exercised his judgment, and, therefore, he alone, under our system, can properly settle the bill. Appellant could have presented his bill of exceptions to Judge Slack either at the time of the ruling, (Code Civ. Proc., § 649), or after the judgment (Code Civ. Proc., § 650; Tregambo v. Comanche etc. Co., 57 Cal. 501); but, whichever course he elected to pursue, it was still the judge who made the ruling who should have settled the bill. Under such circumstances, appellant may have two or more bills settled and properly presented for the consideration of this court."

The authentication must be by the judge or referee who tried the case and if a ruling is made during the progress of a case by a judge other than the one before whom it is regularly pending, and excepted to, the party must, in order to make it available on appeal, obtain the settlement of a bill as to that particular ruling before the judge who made it. It is no objection that there are two bills or statements in the same case.[197]

When first adopted, the Code of Civil Procedure did not provide for statements on motion for new trial, but provided for bills of exceptions in lieu of the statements in use under the Practice Act. It was held that these bills could be authenticated by stipulation as formerly.[198] But the code provision on the subject was amended in 1874, so as to read as above shown; and ever since it has been uniformly held that the judge's signature is indispensable, notwithstanding any stipulation by the parties.[199]

197 Cal. Code Civ. Proc., § 650.

198 Sawer v. Garcia, 49 Cal. 219, holding that the stipulation of the attorneys was a waiver of the authentications by the judge.

199 Schrieber v. Whitney, 60 Cal. 431; Adams v. Dohrman, 63 Cal. 417; Meyer v. Binkleman, 5 Colo. 133; State v. Maines, 26 Wash. 160, 66 Pac. 431; April Fool G. M. & M. Co. v. Dula, 24 Nev. 289, 52 Pac. 648; Parrott v. City of Hot Springs, 9 S. Dak. 206, 68 N. W. 329, holding an authenticated statement to be a nullity. See, Jackson v. Puget Sound Lumber Co., 115 Cal. 635, 47 Pac. 603, as to power of judge to sign after filing; post, §§ 442-446. Adams v. Dohrman, supra, in view of last named case goes too far. A rehearing was granted and then denied because granted one day too late. Hence, it cannot be considered authority for anything, except so far as in harmony with other decisions. Where parties stipulated that a bill of exceptions might be signed out of term, and be of the same force as though signed during the term, an objection that the bill was filed after the adjournment of the term was held not available: Rhodes v. Drummond, 3 Colo. 374. And where a proposed statement of facts, although not containing all the evidence in an equitable cause, is filed by the appellant, and no proposed amendments are filed and served by the respondent, such proposed statement becomes for all purposes an agreed statement of facts, and, under circumstances is conclusive on the parties on appeal, when the trial judge certifies that it contains all the material facts: Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389. And an

There is a dictum in one case to the effect that a stipulation might be so framed as to dispense with the record authenticated as required by law,[200] but there is no decision in support of any such proposition.

As to the sufficiency of the court's authentication, or certificate, the provisions in the various states must be consulted, as well as the decisions in which they have been construed. It will be seen above that in California the provision is that "when settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed."

It will be observed that the certificate is to be "to the effect" that the same is allowed. A certification that the statement "is allowed" is undoubtedly sufficient, as would be any language signifying substantially the same thing. In many of the certificates seen in the supreme court records will be found a great deal of superfluous matters, such, for instance, as that the statement or bill was duly and regularly proposed, that the contents of documents therein set forth are true copies, that the parties appeared by their attorneys at the settlement, or that it was settled upon timely notice, etc. All that the code requires in the certificate is a statement that it "is allowed." All other matters are useless to be stated, because they are presumed unless the contrary appears, and if the contrary appears, such certification would be abortive.[201] Nor is it required that the judge shall enumerate and specify each class of matter contained in the statement as settled and allowed. A certificate "that the foregoing statement on motion for a new trial is a full, correct, and true statement of the evidence in the foregoing case, and is hereby allowed," is sufficient.[202]

agreed statement of facts may be brought into the record by bill of exceptions or statement: Raymond v. Spicer, 6 Dak. 45, 50 N. W. 399; Sweet v. Myers, 3 S. Dak. 324, 53 N. W. 187.

200 Siebe v. Joshua Hendy M. Works, 86 Cal. 390, 25 Pac. 14.

201 As to making contrary appear, see post, § 687.

202 Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124, the Montana statutes being the same as that of California. Appended to the statement on the motion for a new trial was a certificate of the trial judge, signed by him, as follows: "I hereby certify that the

A statement without the certificate and signature will be stricken from the record or disregarded on appeal.[203]

Under the California Practice Act of 1851, which did not provide any method of authentication, it was held that the simple signature of the judge was sufficient.[204] But that decision cannot be regarded as authoritative under the code provision.[205] It was held that a certificate by the judge that the statement was correct according to his recollection, was insufficient, the same not being a substantial compliance with the statute as it then existed, not prescribing any particular form of authentication.[206] But a certificate that a statement was "substantially correct" was held sufficient.[207] And when the statute required the judge to certify that the statement "has been allowed by him and is correct," it was held that a signed certificate in these words, "I hereby certify that the foregoing is the settled and engrossed statement on motion for

foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor." Held, Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278, that the statement was properly settled. The mere identification by the trial judge of a transcription of the reporter's notes as a part of the bill of exceptions and an order that the same be attached thereto as a part thereof does not make it so: Nosler v. Coos Bay Nav. Co., 40 Or. 305, 63 Pac. 1050; 64 Pac. 855. As to sufficiency of judge's certificate, see St. Croix Lum Co. v. Penington, 2 Dak. 467, 11 N. W. 497; First Nat. Bank v. Bank, 5 N. Dak. 161, 64 N. W. 941; Nollman v. Evanson, 5 N. Dak. 344, 65 N. W. 686.

203 Scherrer v. Hale, 9 Mont. 63, 22 Pac. 151. See, also, Steuffen v. Jefferis, 9 Mont. 66, 67, 22 Pac. 152; Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258; Becker v. Commissioners etc., 10 Mont. 88, 24 Pac. 700; Montana Land & P. C. v. Howard, 10 Mont. 298, 25 Pac. 1024; Slater v. Railway Co., 8 Utah, 180, 30 Pac. 493; Cosgrove v. Johnson, 30 Cal. 509.

204 Kidd v. Laird, 15 Cal. 177, 76 Am. Dec. 472.

205 See Montana L. & P. Co. v. Howard, 10 Mont. 296, 25 Pac. 1024, holding that statement must be settled according to law; not simply signed.

206 Van Pelt v. Littler, 14 Cal. 196.

207 Battersby v. Abbott, 9 Cal. 565. This certificate was made under the statute governing statements on appeal, requiring that the judge should certify that the statement "has beeen allowed and is correct."

new trial of the above-entitled cause," was a substantial compliance with the statute and entitled the statement to consideration.[208] The court reasoned that when the judge certified that he had settled the statement, he in effect certified that it was a true and correct statement; that the fair and reasonable presumption was that he made it conform to the truth. An exact compliance is easy and safer, and leaves no room for discussion as to what is a substantial compliance.

It is the engrossed statement and not the draft produced by the settlement without engrossment ready for filing to which the certificate should be appended. In Smith v. Davis,[209] the transcript on appeal contained the original draft of a statement proposed by the plaintiff, amendments proposed by the defendants, and counter amendments proposed by the plaintiff, and a certificate signed by the judge that "the foregoing amendments proposed by defendant are allowed, and the further proposed amendment by plaintiff is also allowed; and said statement of plaintiff as amended is hereby settled as correct." The supreme court, in affirming the order denying the motion for a new trial said: "It appears that the proposed statement and amendments were allowed by the court below, but the statement and amendments were never engrossed and authenticated by the signature of the judge. Such documents, not engrossed into one, and attested by the signature of the judge, have never been regarded as the statement required by law, and have never been considered by this court on appeal." This was approved and followed in a later case.[210]

§ 443. Duty of court to settle; not merely to sign.

The statutory requirement as to brevity and conciseness in the preparation of statements and bills has been heretofore

208 Overman Silver Min. Co. v. American Min. Co., 7 Nev. 312, 317. That a substantial compliance with the statute is all that is required, see Henderson v. Grewell, 8 Cal. 583; Cosgrove v. Johnson, 30 Cal. 511.

209 55 Cal. 26, citing Baldwin v. Fene, 23 Cal. 461.

210 Sawyer v. Sargent, 65 Cal. 259, 3 Pac. 872. See Biagi v. Howes, 66 Cal. 469, 6 Pac. 100, holding that the statement is not required to be filed until certified and signed by the judge.

considered.[211] It only remains to explain the duty and responsibility of the court to enforce this requirement, by visiting the penalties of its nonobservance upon the parties. No attempt will be made to improve upon the language of the appellate courts on the subject. In Montana Lumber and Produce Co. v. Howard,[212] a motion was made on appeal to strike from the record what purported to be a bill of exceptions prepared after the denial of a motion for a new trial on the minutes, consisting merely of the notice of intention, pleadings, testimony, instructions, verdict and judgment, with a recital that "all of the foregoing papers and evidence were of the files of said cause at the hearing of said motion for a new trial." and terminating with a statement signed by the judge in the words, "Done and dated in court, this twenty-seventh day of September, 1890." In holding the papers valueless as a bill of exceptions and the signature of the judge as a nullity for the purpose claimed, and granting the motion, the court said: "No one can contend seriously that this is a settlement of this important record 'in the usual form.'" In January v. Superior Court,[213] the court remarked that "the bill of exceptions, as originally presented, was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it." In People v. Getty[214] the bill of exceptions appeared to consist of the reporter's notes, written out in longhand, containing the questions and answers in full, and the side bar conversations and remarks of the judge, counsel, jurors and witnesses. The supreme court examined the points presented in the case, being reluctant no doubt to visit the consequences of neglect upon the defendant, but criticised such practice as follows: "In no

211 Ante, § 431.

212 10 Mont. 298, 225 Pac. 1030, and cases cited. Failure to propose amendments does not preclude amendment by the judge conformably with the facts: Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

213 73 Cal. 537, 15 Pac. 108.

214 49 Cal. 581, 584. To same effect, People v. Sprague, 53 Cal. 422. See, also, Frazer v. Superior Court, 62 Cal. 50; Valleau v. Superior Court, 62 Cal. 290, applying rule to statements. Writ of mandate denied in both cases.

conceivable case can it be necessary or proper that a bill of exceptions should be made up in that manner. It was never intended that the reporter's notes should constitute a bill of exceptions. The evidence relating to the points presented should be stated, as far as possible, in narrative form, or by a statement of its substance, or what it tended to prove, and the questions should be stated only when it is necessary to present the points of an objection thereto. The practice of making up bills of exceptions in the reprehensible form adopted in this case has become so prevalent that some measures must be taken for its correction. The judge of the court below would be justified in refusing to settle a proposed bill of exceptions when it is presented in that form, and we are of the opinion that it is his duty to strike it from the files. The proposed amendments to the bill, if obnoxious to the same objections, should be treated in the same manner."

But a distinction is made between indifference and neglect of duty by counsel and inaccuracies and imperfections characterizing the matter presented by the respective parties. It frequently happens that the views of counsel are so divergent as to cast upon the trial judge the task of substantially making large portions of the bill or statement, with only such aid as is furnished by the files and a transcription of the reporter's notes. For this there appears to be no remedy. In Sansome v. Meyers,[215] a case in which a mandate was sought to compel the trial judge to settle a bill of exceptions, the judge of the trial court had refused to settle the bill upon the ground that he deemed it inaccurate and in many respects untrue, and that it contained but a partial statement of the facts and proceedings leading up to and connected with, and upon which, the rulings of the court were had that were complained of. In passing upon this answer to the petition the court said: "We do not regard these as sufficient grounds for refusing to settle a statement. If anything was omitted from the statement, or any matter was incorrectly stated, it was the duty of the district attorney to propose such amendments as would correct the omission or errors. His failure to do his duty in this respect did not justify the respondent in arbi-

215 80 Cal. 483, 485, 22 Pac. 212.

trarily refusing to act in the matter. As was said in the former decision in this case, it was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it. If the attorney for the petitioner had omitted anything material, the judge should have directed and required him to insert it, or if matter was incorrectly stated, he should have required him to correct it, if the district attorney had neglected his duty by failing to propose the necessary amendments, which he seems to have done. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would no doubt have been justified in refusing to settle the same, but not otherwise. This the findings show was not done. The respondent refused in the first instance to settle the statement, not to sign it. This we think he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty." The question is one of considerable importance. A refusal to settle a statement or bill proposed in proper time and in good faith, if upheld by the supreme court on petition for writ of mandate, would be an end of proceedings on appeal, if after the hearing of the motion, and would deprive the movant of the right to be heard if proceeding under the third subdivision, and would have similar effect, in case of a bill of exceptions to be used on appeal from the judgment. And the supreme court in Cohen v. Wallace[216] took special care to explain and qualify its emphatic expressions in prior cases with a view to preventing mischievous results to litigants by reason of a too literal acceptance of the same. After a review of the cases the court (in bank) said: "From these cases it may be fairly taken as established that in instances where the proposed bill is either merely a copy of the reporter's transcript, without any effort to reduce to proper

216 107 Cal. 133, 139, 40 Pac. 101. When the court finds that the statement prepared by defendant's counsel represents as correctly as possibly the proceeding had on trial of the case, its proper course is to settle the same accordingly without compelling the transcription of the evidence by the phonographic reporter, and upon such settled statement to hear and pass upon the motion. Storke v. Storke, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121.

form for the purpose of presenting the question involved, or where it is a mere skeleton, so bald of the essential requisites of the bill contemplated by the statute that it cannot in any true sense be regarded as such, it may be disregarded, and a settlement of it will not be required. This doctrine, however, is a harsh and rigid one, and if considerately applied would be liable to great abuse, and frequently operate a virtual denial of justice to a defendant, solely through the ignorance, incompetency, or indolence of counsel, for which he may be in no way responsible. For these reasons we are not disposed to extend its application to cases not falling strictly within the class to which it has heretofore been held to apply. Even in such cases we are of the opinion that it would be better, as a general rule, if the judge of the trial court, disregarding as far as possible technical objections, should endeavor to settle the bill rather than refuse it. For this purpose it is not necessary that the labor of making a proper bill of exceptions should be assumed by the judge. The party presenting the objectionable bill could be required by the judge to put it in proper shape, giving a reasonable time for such purpose."

§ 444. Skeleton statements permissible.

No inference should be drawn from what is said in the next preceding section derogatory of the right to propose and have settled what is properly and legitimately a skeleton statement. If the evidence in a case consisted entirely of documentary evidence and exhibits in the hands of the court, a statement or bill, as proposed and settled, might, legally, and greatly to the convenience of the parties, consist almost entirely of suggestions for insertions. In Reclamation District v. Hamilton,[217] the court held that the trial court was not

217 112 Cal. 603, 607, 44 Pac. 1074. It is not necessary that appellant in preparing his proposed statement, incorporate therein copies of the exhibits in evidence and in the clerk's possession, but it is enough that it refer to them, and that the judge in settling the statement directs the clerk to attach them thereto, and after they are attached the judge makes a further certificate of their correctness: Pennsylvania Mortg. Inv. Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246.

warranted in refusing to settle a skeleton statement which was otherwise unobjectionable, saying: "It is further objected that reference is made to certain records, thus: 'In minute-book of said board appears the following order on page 331 (here insert).' This is common practice in preparing proposed statements. It is seldom that proposed statements are not amended, and almost invariably it becomes necessary to re-write them. The reference to the documents or record, with the remark 'here insert,' notifies the opposite party that it is to become part of the statement. Such reference would, of course, not be sufficient in the engrossed statement." The closing sentence of this quotation cannot be considered authoritative in view of a later decision on the subject to the contrary.[218] When, however, the judge certifies that the engrossed statement on motion for a new trial is a mere skeleton, and also that it does not contain all the evidence offered at the trial tending to prove the allegations of the answer, and where it appears that it does not adequately present the evidence in respect to which errors are claimed, the statement may be disregarded.[219]

§ 445. Extensive powers of trial courts over settlement of statements and bills.

Each of the steps to be taken in connection with a motion for a new trial, as well as the settlement of a bill of exceptions for use on appeal from the judgment, in a nisi prius court constitutes a "proceeding" within the meaning of statutes permitting amendments and relief from surprise, mistake, excusable neglect, etc.[220] Consequently, reasonable, and in some instances a wide latitude of, discretion has been conceded to them in the matter of amending statements and bills, and in relieving parties from the consequences which would otherwise result

218 Lakeshore Cattle Co. v. Modoc Land Co., 127 Cal. 37, 39, 59 Pac. 206.

219 Brind v. Gregory, 122 Cal. 480, 55 Pac. 250.

220 Stonsifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Banta v. Siller, 121 Cal. 414, 416, 53 Pac. 935.

from a failure to take essential steps in the proceeding within the legal time.

The question of the power of the court to permit an amendment first arose in California prior to the adoption of the new constitution of 1879, abolishing terms of court, in the case of Spanagel v. Dellinger,[221] and the conclusions there reached are still important in all states where stated terms of court are held. The case has been often cited and its doctrine adopted in other states. The respondent on appeal moved to strike out the statement on motion for new trial, upon the ground that it was not filed within the proper time. The facts upon which the motion was based were as follows: On the day upon which the finding or decision was filed, counsel for respondent served counsel for appellant with notice of such filing. Within ten days thereafter the latter served upon the former notice of intention to move for a new trial. Within five days after notice of motion for new trial counsel for appellant applied to the court for an order allowing twenty days in addition to the time allowed by the statutes for that purpose, in which to prepare and file a statement on motion for new trial which was allowed, but by mistake the order was entered as allowing the additional time for the purpose of preparing and filing a statement "on appeal," instead of "new trial." Subsequent to this order, and before any further action on the part of the court was called for, the court adjourned. At the next term the mistake having been discovered in the meantime, counsel for appellant moved the court to amend the order, so as to make it conform to the truth, as alleged by him. The court sustained the motion, and the order was amended accordingly. Upon these facts, the statement was filed in time if the court had power to make the order amending its order, otherwise not. Sanderson, C. J., delivering the

221 34 Cal. 476, 482 (citing authorities). Cited and approved on same point in Marshall v. Golden Fleece M. Co., 16 Nev. 156, 170. In Labdell v. Hall, 3 Nev. 507, 522, will be found an able opinion by Chief Justice Beatty on the same question upon a rehearing. It is in substantial accord with the opinion in Sponagel v. Dellinger, 34 Cal. 476, and both decisions were rendered at the January term, 1868, of the respective courts.

opinion of the court, overruling a former decision,[222] sustaining the power of the lower court to make the amendment and denying the motion to strike out the statement, said: "The general rule that a court cannot amend its record after the adjournment of the term at which it was made, except where the record contains matter to amend by, announced in that case, is correct; but we erred in considering proceedings inaugurated or taken for the purpose of setting aside the verdict and obtaining a new trial as constituting a part of the record of the term at which the judgment was entered within the sense of that rule, which was due doubtless to the fact that the difference which exists between the making of the record at common law and under our practice was overlooked. We said: 'At common law, when the proceedings have been entered, the court would allow no further amendments; but by the statutes of jeofails and amendments a still further right of amendment was given. The making up of the judgment-roll is the equivalent, under our Practice Act, of the entry of record at common law.' The former proposition is correct, but the latter is too broad and therein lies the vice of our decision in that case. In respect to the general purpose and effect of a record, the making up of the judgment-roll under our practice and the entry of record at common law are doubtless equivalents; but in respect to proceedings taken for the purpose of obtaining a new trial, they are not the equivalents of each other. The difference lies in the fact that at common law the judgment was not entered or signed until after the motion for new trial had been heard and determined. Hence the record was not made, in the sense of the rule under consideration, until the court had finally disposed of the whole case, including the motion for a new trial; so that the proceedings on the motion for a new trial did not reach beyond or succeed the entry of judgment and the adjournment of the term, therefore, did not thereafter continue 'in the breast or memory of the judge,' but like all other proceedings in the case, existed in the record already made, which could not thereafter be altered or amended, except as already suggested. Under our practice the rule is otherwise. The motion for new

222 De Castro v. Richardson, 25 Cal. 49.

trial may be made before and after the entry of judgment or the making of the roll, but in either event, as we held in the cases cited, the motion proceeds independently of the judgment, and mainly upon a record of its own, which may or may not be made at the term at which the judgment was entered and may be made out of term as well as in. It is unaffected by an adjournment of the term, but proceeds all the same, whether in term or vacation, and remains in fieri until the final order granting or denying it is made; and until that time, at least, the record cannot be said to have been made, in the sense of the rule under consideration. Until then, the proceedings must be considered as being 'in paper,' or in the 'breast of the judge,' in the common-law sense of those terms, and, therefore, within the judge's control on the score of amendment. In sense of the rule in hand, as to a motion for a new trial, it begins and ends with the motion." The liberality of view as to acts of the trial judge herein, in the exercise of jurisdiction under section 473 of the California Code of Civil Procedure (like provisions being found in statutes elsewhere) was shown in Banta v. Siller.[223] The case is instructive both for its doctrine and with reference to the practice suggested, where by inadvertence the time has lapsed. In that case, the statement was prepared in proper time and amendments duly proposed, and the defendants gave notice to the plaintiff that they would present the statement, with the amendments, to the judge for settlement on the twenty-seventh day of February, 1896, which was within the ten days prescribed by the code. They were not presented to the judge on that day, but were left with the clerk for him two days afterward. Subsequently, on March 16th, the proposed statement and amendments came up for settlement, and upon objection of plaintiff, the court refused to settle the same. On the same day the defendants served notice of a motion to be relieved from the order refusing to settle the statement on the ground of inadvertence, excusable neglect, etc. The court granted the motion, and thereafter, against the plaintiff's objection, settled the statement as presented in the supreme court on appeal from an order denying the de-

223 121 Cal. 414, 53 Pac. 935.

fendants' motion for a new trial. The plaintiff (respondent) objected to a consideration of the statement on the ground that it had neither been presented to the judge nor left for him with the clerk within the time limited by law. The court upheld the power of the trial judge to relieve the defendants in the manner shown as the exercise of jurisdiction under section 473 of the Code of Civil Procedure, and said that "under that section the release of a party from a proceeding taken against him through mistake, inadvertence, etc., is a matter largely within the discretion of the trial court. An order granting such release will not be disturbed here, unless it clearly appears that the court or judge was guilty of gross abuse of discretion in making it. Indeed, it has been frequently said that, in cases of doubt, the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation might be presented." The decision was rested upon the authority of a prior decision in which the trial judge had refused to relieve the party on the ground of a want of jurisdiction, though admitting that the showing upon the application for relief was sufficient, and the supreme court had reversed his ruling.[224] The true basis for the doctrine of these decisions is that, in order to prevent the proceeding proving abortive, by reason of some slip, oversight, mistake or excusable neglect, the trial court may resort to the power conferred by section 473 for such occasions. They are not in conflict with the decisions found in California and other states to the effect that once the court loses jurisdiction, it cannot be restored, and that the court has no jurisdiction to grant an extension of time after the expiration of the time limited by law or previous extensions thereof. In the later case, Justice Temple filed a concurring opinion in which he stated that he concurred only by reason of the former decision, which he vigorously assailed. The decision was rendered in department. The chief justice dissented from an order denying a hearing in bank. But it should be noted that in the earlier case, thus criticised, the court distinguishes decisions prior thereto from the case then before the court in these words: "It is contended that the court had no power to relieve ap-

224 Stonsifer v. Kilburn, 94 Cal. 33, 29 Pac. 32.

pellants from the legal effect of their failure to serve their proposed bill of exceptions in time, even though their default was caused by their excusable mistake, and the relief asked be deemed just. But the cases cited in support of this point seems to go no further than to determine what is the legal effect of the default in the absence of a proper and well-grounded proceeding to be relieved from it, and do not determine that the court has no power, under any circumstances, to relieve a party from such legal effect. The distinction seems quite as clear as that between determining the legal effect of a judgment by default, and adjudging that, under no circumstances, can a party be relieved from the legal effect of such judgment."[225]

§ 446. Extensive powers of trial courts over engrossment and amendment.

Much more liberal views have recently prevailed than formerly with respect to the power of trial judges subsequent to settlement, engrossment and filing statements and bills. There is scarcely any limit to the power thus conceded to them, upon proper motion made in due time in cases where the due form of settling the statement has been observed, however defective the performance. But the principle stated in an early case[226] does not require, nor has it received any criticism or modification—namely, that the statement should not be amended except upon a very clear showing.

It appears to be now settled that the specifications in a statement may be amended by the moving party on the hearing of the motion, if the adverse party will not be injured by the amendment.[227] This power to amend the specifications

225 Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332.

226 Hutchinson v. Bours, 13 Cal. 50.

227 Low v. McCallan, 64 Cal. 2, 27 Pac. 787, cited in Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 538, 12 Pac. 530, also holding that specifications may be amended after the time for settling statement has passed: Scott v. Bourne, 13 Wash. 471, 43 Pac. 372. This right was denied in Levy v. Gettleon, 27 Cal. 686. But that case cannot be regarded as authority at the present day. A bill of exceptions which has been settled, allowed, and signed by the trial judge can be amended by order nunc pro tunc at a sub-

includes the right to insert additional specifications.[228] So if, upon proper showing, there is no error in setting aside the settlement and allowance of a statement and allowing it to be reingrossed so as to include exhibits referred to therein, which had not been engrossed at length; and, for the purpose of determining what exhibits were in reality referred to in the statement, the court is authorized to make such investigation as may enable it to settle the statement according to the facts.[229] And in Jackson v. Puget Sound Lumber Co.[230] the right to have a bill of exceptions certified and signed by the judge after it was filed, and after the time for its settlement had passed, he having inadvertently omitted to do so before filing, was established, a request therefor having been made before the time for filing the bill had elapsed. Beatty, C. J., delivering the opinion, said: "The defendant had done all that the law required him to do, and was entitled to have his bill of exceptions certified, for otherwise it could not avail him in this court. The statute, it is true, directs that the bill shall be filed after it is signed by the judge or referee, with his certificate that it is allowed, but it is not to be concluded from this provision that, if the settled and engrossed bill of exceptions happens to be filed with the clerk, by inadvertence of the judge or referee, or even of the party seeking its al-

sequent term, and after an appeal has been taken and perfected, so as to make the bills agree with the real facts: State v. Estes, 34 Or. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25. In South Dakota a bill of exceptions from which something material has been omitted, or inserted by mistake or inadvertence may be returned to the lower court upon order of the appellate court for correction: Comp. Laws, § 4938; Laws 1897, c. 34; Hedlun v. Holy Terror Min. Co., 14 S. Dak. 369; 85 N. W. 861; Foley & Wadsworth Co. v. Porteous, 7 S. Dak. 34, 63 N. W. 155.

228 Gill v. Hecht, 13 Utah 5, 43 Pac. 626. See Dutton v. Seevers, 89 Iowa, 302, 56 N. W. 398; Seagrove v. Hall, 10 Ohio Civ. Ct. Rep. 395, Davis v. Cook, 9 S. Dak. 319, 69 N. W. 18.

229 Warner v. Thomas (The F.) Parisian D. & C. Works, 105 Cal. 409, 39 Pac. 960.

230 115 Cal. 632, 634, 47 Pac. 603. In Richardson v. Eureka (City of), 96 Cal. 443, 31 Pac. 458, the action of the trial court in permitting attorney for movant to sign statement at settlement; also in permitting a further amendment after the time for filing it had elapsed was sustained.

lowance, before it has been properly certified, the right to a proper certificate is forever lost. On the contrary, it ought to be considered that such filing is premature and unauthorized, and, if a timely request is made for the certificate of allowance, it should be granted, and the bill refiled." But the power to amend a statement or bill of exceptions terminates upon the disposal of the motion for a new trial.[231]

At this point must be noted one of those technical differences—this time not between statements and bills of exceptions—but between two kinds of bills of exceptions—resulting from divergences from uniformity in the respective provisions in the code governing herein. The following language of the court per the chief justice in Baker v. Borelli[232] will be quoted to make the distinction: "We are brought then, to the question whether it was competent for the superior court to correct this bill of exceptions after the entry of the order denying a new trial, and an appeal to this court, and the filing of the record here. This bill of exceptions being the basis of the motion for a new trial, and the record upon which the order overruling that motion rests, cannot be changed without first setting aside that order. And can that order be set aside by the superior court after it has been appealed to this court? We have no doubt that a bill of exceptions, or statement which has been settled after appeal taken, may be cor-

231 Baker v. Borelli, 131 Cal. 615, 617, 63 Pac. 914, followed and adopted in same case, 136 Cal. 160, 166, 68 Pac. 591; Grand Grove etc. v. Garibaldi Grove etc., 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 456, limited in its application, 131 Cal. p. 618, 63 Pac. 1017.

232 131 Cal. 615, 617, 63 Pac. 914. In support of the proposition that "a bill of exceptions, or statement which has been settled after an appeal taken may be corrected by a proper proceeding under section 473 of the Code of Civil Procedure. Commenced within six months after the settlement, the court cited Flynn v. Cottle, 47 Cal. 526; Sprigg v. Barber, 118 Cal. 592, 50 Pac. 682, and In re Lamb; 95 Cal. 408, 30 Pac. 568. In support of the proposition that where a new trial has been granted by an order improvidently or prematurely made before the record was properly settled and certified, the supreme court, upon reversal of the order, may remand the cause for further and orderly proceedings upon the motion, the court cited Morris v. DeCelis, 41 Cal. 331, and Thomas v. Sullivan, 11 Nev. 280.

rected by a proper proceeding under section 473 of the Code of Civil Procedure, commenced, as this was, within six months after the settlement, for, in such cases, the superior court is empowered to settle the bill or statement—i. e., to complete the record—after and for the purpose of the appeal. But a bill of exceptions, prepared and settled beforehand, to be used in support of a motion for a new trial, after the denial of the motion, raised a different question. We are of the opinion that in such case, the record cannot be amended, and this for reasons which, though technical, are nevertheless conclusive. The appeal deprives the superior court of jurisdiction to set aside its order denying a new trial, and while that order is in force, the record upon which it is based cannot be changed, and this court must review the order upon the same record upon which it was made. It has been held, and we have no doubt correctly held, that where a new trial had been granted by an order improvidently or prematurely made before the record was properly settled and certified, this court, upon reversal of the order, may remand the cause for further and orderly proceedings upon the motion; but this rule of practice does not meet the exigencies of this case." In California, the supreme court went so far in one case as to hold that the amendment may amount to the insertion of an entire list of specifications, at any reasonable time after its proposal, and that in such case, the limitation of six months fixed in section 473 of the Code of Civil Procedure for applications for relief from result of mistake, inadvertence, etc., does not apply.[233] However, as the statement had never been certified or signed, it is doubtful whether the six months period of limitation had commenced to run against it. The general rule is that six months bars the right to amend.[234]

The party desiring to amend a statement or bill which has been already settled and filed should include an application to set aside and reopen the settlement, without which the court

233 Smith v. Stockton (City of), 73 Cal. 204, 41 Pac. 675. As to right to add grounds of motion after time for filing statement was passed, under the old Practice Act, see Valentine v. Stewart, 15 Cal. 396; Loucks v. Edmondson, 18 Cal. 203.

234 Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682; Flynn v. Cottle, 47 Cal. 526.

has no power to alter or amend. This is also necessary to enable the opposite party to suggest amendments to meet those proposed by the movant. Such right was thus explained where an amendment was sought in order to insert an additional specification in a statement settled by stipulation under the California Practice Act of 1851: "We think that, notwithstanding the stipulation, such specification might be added, and that the plaintiff, too, was at liberty, notwithstanding the stipulation, to propose such amendments to the statement as might appear necessary in view of the specifications subsequently appearing to be relied upon in support of the motion. Upon any other construction, it would result that, upon the one hand, the motion must necessarily be defeated altogether for the want of specifications, or upon the other hand, the plaintiff be deprived of the opportunity of suggesting amendments rendered necessary in view of the particular specifications presented."[235]

There should, of course, not be two statements or bills in the same case and for the same purpose; and the court should not, while one is before it or on file, settle or participate in the making of another.[236] And it was recognized as the proper practice prior to the code for the court to order a cancellation of its certificate to a statement or bill already settled and filed, preliminarily to amendment.[237] The practice must be the same under the code, for the provisions are the same in the two procedure acts.

It is immaterial with respect to appeals from the judgment upon which a bill of exceptions is to be used that the application is made after the appeal is perfected; but it is otherwise if the appeal was from the order on a motion for new trial as previously explained.[238] In any event, the application for relief by amendment should be made in the lower court.[239]

235 Lucas v. Marysville (City of), 44 Cal. 210, 212.

236 People v. Romero, 18 Cal. 90, 92.

237 Flynn v. Cottle, 47 Cal. 526, a case decided after the adoption of the code, but governed by the Practice Act because tried before Code of Civil Procedure became effective.

238 The case of Baker v. Borelli, 131 Cal. 615, 63 Pac. 914, would appear not to be authoritative under the former Montana statute:

§ 447. Engrossment.

The subject of engrossment of statements and bills seldom comes before appellate courts in direct connection with the appeal where, as in California, the rules require printed transcripts. In that state, it is one to be dealt with almost exclusively in the lower court. In some states, however, the original files, including any settled statements or bills of exception, or certified manuscript copies thereof are still in use on appeal. In such states, a proper, correct, and legible engrossment is usually exacted. The engrossment means not only a preparation of the record so that its contents may be read, but a convenient arrangement of its parts; and it was held that a statement on motion for a new trial, the beginning or ending of which was not indicated in the record, and which was a transcript of the stenographer's notes by question and answer, and was never settled by the trial judge, nor the papers therein arranged in chronological order, would not be considered by the court on appeal.[240] But the same court held that a statement on motion for a new trial would not be disregarded because amendments thereto were not engrossed in the record, but occupied separate position at the close of the

Williams Mercantile Co. v. Fussy, 13 Mont. 401, 34 Pac. 189. But as the code provisions are now substantially the same herein as those of California, the same view would probably prevail thereunder as in that case. See, also, James v. Leport, 19 Nev. 175, 8 8 Pac. 47; Coulter v. Great Northern Co., 5 N. Dak. 585, 67 N. W. 1046.

239 For court's powers with respect to engrossment and amendment of bills, see next succeeding section.

240 Becker v. Yellowstone County, 10 Mont. 87, 24 Pac. 700. In Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001, it was held that amendments which had been allowed to a statement would not be considered by the court on appeal, when such amendments did not appear in their appropriate places, but were tacked to the end of the statement in their original language with references to pages and lines in the original draft. See, also, Dyea Elec. L. Co. v. Eastern, 15 S. D. 572, 90 N. W. 859; Hattabaugh v. Vollmer, 5 Idaho, 23, 46 Pac. 831. The trial judge owes no duties with reference to the engrossment of the hill after deciding what it shall contain: Edwards v. Baker, 3 N. Dak. 170, 54 N. W. 1026.

statement, where such amendments comprised additional matter which was complete and intelligible in itself.[241]

[241] Penn Placer Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878, and the Washington court held that where a statement of facts proposed by appellant and an amended statement proposed by respondent, were certified by the trial court as together containing the matters and proceedings occurring in the cause, the supreme court would treat the combined statements as constituting properly a part of the record, especialy when no objection was made in the court below against both proposed statements being made a part of the record: Herrman v. Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82. The facts and views of the court in this case are thus stated: "Respondent moves to strike the statement of fact, for the reason, as urged, that the court has settled two separate and complete statements which are inconsistent and conflicting with each other. From the record it appears that appellant duly filed a proposed statement. The evidence is not set out in the form of questions and answers as taken by the stenographer, but is set forth in narrative form, and purports to contain all the material facts, matters, and proceedings which occurred at the trial. In due time respondent filed what is denominated as amended statements of facts, proposed by respondent as a substitute for the original statement proposed by appellant. In the latter proposed statement the evidence is also set out in narrative form, and purports to be a complete statement of all the evidence, and of all that occurred at the trial. The certificate of the court is to the effect that the matters and proceedings embodied in the appellants' proposed statement and in the respondent's proposed amended statement, combined, are matters and proceedings which appeared in the cause, and they are made a part of the record. The court, in its certificate, also refers to the combined statements as 'the foregoing statement,' thus treating them as a unit, and as comprising one statement in the case. Respondent contends that appellant's proposed statement is distorted, garbled and incomplete; and appellant makes a like charge against the amended statement proposed by respondent. It is manifest that this court has no means of determining the accuracy of the respective contentions, and must rely upon the certificate of the trial court. That certificate recites, in effect, that the contents of each of the proposed statements are truthful accounts of matters which occurred at the trial, and both are therefore approved and made a part of the record. It is doubtless the court's view that omissions in one proposed statement were supplied by the other. In any event, repondent's motion to strike the whole statement as settled seems to us inconsistent, since the motion includes respondent's own proposed amended statement, submitted by itself for certification, which purports to be complete in itself, and which the court had made a part of the record. Moreover, we are unable to find in the record any objec-

In California, a prevalent and convenient practice of omitting to copy exhibits and documentary evidence generally into the skeleton statement, but filing the latter and furnishing the former to the printer came before the supreme court in Lake Shore Cattle Co. v. Modoc Land Co.,[242] and was sanctioned. In overruling an objection presented by the respondent to the course there pursued, in filing the skeleton statement as signed and certified for the engrossed statement, the court said: "The alleged defect in the engrossed statement was that certain documents on file in the action had not been transcribed at length; but exact reference had been made to them as exhibits, with the direction 'here insert.' But as to documents on file, this is sufficient engrossment for the purposes of the hearing before the trial court. It is a procedure countenanced by the code, and justified by our decisions. Of course. in printing the transcript on appeal to this court, documents must be inserted at length." In this case, the court referred to section 648 of the Code of Civil Procedure for a provision authorizing the practice there adopted. That section governs the settlement of bills of exceptions, but by analogy is held applicable to the settlement of the statement to be used on the motion, there being no corresponding provision in section 659 governing the latter. But where the hearing is on the minutes, section 660, providing that "where the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file" applies. Both sections refer to documentary evidence, which means paper exhibits, "on file." As has been previously explained,[243] the fact that the phonographic notes are on file does not justify their incorporation in the statement by way of engrossment, in the original form of a transcription thereof, nor does the fact that documentary evidence is on file

tion made in the court below to the signing of the court's certificate as it was signed, making both proposed statements a part of the record. For the foregoing reasons we must treat that which the court has made a part of the record as constituting the statement of facts for the case, and the motion to strike is denied."

242 127 Cal. 37, 39, 59 Pac. 206. Citing Code Civ. Proc., § 648; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

243 See ante, § 431.

necessitate its insertion in the engrossed statement. It may be simply referred to, as, for instance, "a power of attorney authorizing A. B. to lease" a certain tract of land, there being no dispute as to its sufficiency as authority, would be sufficient; and if the party using the statement makes no point as to the admissibility of a document, it is sufficient to say that such and such an instrument, or paper "was read in evidence" by plaintiff, or by defendant, according to the fact.

It is not the usual practice to have the file marks actually placed upon exhibits, though, strictly speaking, that is what the statute contemplates. It is sufficient for the purposes of engrossment after the manner of a skeleton statement that they be actually delivered to the clerk and marked as exhibits, or perhaps even though they be not so marked. Though the law contemplates that they shall remain in custody of the court, it is the usual practice for them to be withdrawn by consent, or by permission of the court. Without such consent or order, copies may be made before or after their being introduced in evidence for the purposes of preparing statements and bills of exceptions, or having them printed as part of the transcript on appeal.

§ 448. Service.

With reference to the time within which service of the draft of the proposed statement or bill, and of the amendments thereto, should be made, little need be added to the requirements of statutes. These are usually clear and explicit. The provision in the California Code of Civil Procedure is as follows: "If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon adverse party."[244] The provision is now as amended in 1874. Prior to the code, the practice varied with successive amendments to the Practice Act of 1851, so that many decisions will be found inapplicable under the provision as it stands at present except as supporting the general proposition

244 § 659, subd. 3.

that the statutory requirements must be substantially complied with. As first adopted, the Practice Act of 1851 required the proposed statement to be filed, but did not require it to be served.[245] It will be observed that the present code provision reverses the former practice. It requires the proposed statement to be served, but does not require it to be filed until after settlement and engrossment. The superior advantage and convenience of the present system is common knowledge and need not be enlarged upon.

The party has ten full days after service of his notice of intention, and such further time as the parties may agree upon or as may be legally given by the court within which to serve the draft of his proposed statement. The time and all the details correspond exactly with the provisions for proposing and serving drafts of bills of exceptions.[246] Taken as a whole, it amounts to just the same as if the words "bill of exceptions" had been used conjunctively with the word "statement" in subdivision 3, instead of incorporating the provisions of section 650 by reference in subdivision 2 of section 659.

The provision that "the time within which any act provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded"[247] applies here.

That if the tenth day after the day of service of the notice of intention is a holiday, the statement need not be served until the eleventh day thereafter, is so well settled as scarcely to require the citation of authority. Still it was held that the fact that the service of the draft was made on a legal holiday, to wit, the day of a general election, did not invalidate the ser-

245 § 195, see Brandage v. Adams, 41 Cal. 619, 621. In Washington the filing must precede service; and service before filing is a nullity: Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241; Barkley v. Barton, 15 Wash. 33, 45 Pac. 654; First Nat. Bank v. Andrews, 11 Wash. 409, 39 Pac. 672; Laws 1893, c. 60, § 9. The rule seems to be the same in North Dakota and South Dakota: See McGillicuddy v. Morris, 7 S. Dak. 592, 65 N. W. 14; Moe v. Railway Co., 2 N. Dak. 282, 50 N. W. 715.

246 Cal. Code Civ. Proc., § 650.

247 Cal. Code Civ. Proc., § 12.

vice, it not being considered judicial business within the meaning of the constitution.[248]

It would appear that, by analogy and for the same reasons which govern where the service of the notice of intention is involved[249] the court would be without the power to restore the right to serve the statement, after the legal time had passed, by an order extending time, or in other form. It will be presently shown, however, that a party, upon proper showing in a proper proceeding, may be relieved from the consequences of such failure.[250] The result of the principle established in the cases there considered is to render prior decisions authoritative, merely as to the legal effect of a failure to serve the statement within the legal time, unless relieved by the proceeding resorted to in those cases. Although the decision in Henry v. Merguire[251] was rendered subsequently to Stonsifer v. Kilburn,[252] the latter case was not referred to on the question of whether the failure to serve the statement could be in any form excused by the court; but, probably, in view of what had been decided in that case, the court was somewhat guarded in its expressions, as if leaving open the question of relief to a party in default. But in Henry v. Merguire, the court, with emphasis equal to that characterizing its expressions on former occasions, declared the legal effect of a failure to serve the statement or present it for settlement in proper time. It was a case of failure to present a statement to the judge within ten days after service, but the question was the same as in case of failure to serve. The conclusion is clearly deducible from all the cases, and especially from that just mentioned, that the trial judge cannot give any effect to excuses or grounds for relief from neglect or failure to serve or present the statement within legal time at the settlement of the motion; it can only act upon motion under section 473. The proper practice is shown in Stonsifer v. Kilburn above cited. Equally emphatic have been the expressions of the same court as to

248 Reclamation Dist. v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

249 See ante, § 372.

250 See post, § 451.

251 106 Cal. 142, 39 Pac. 599.

252 94 Cal. 33, 29 Pac. 332.

such legal effect in other cases.[253] In Tregambo v. Comanche etc. Co.,[254] the strongest reasons are given in the most emphatic language against the power of trial judges to disregard the mandatory terms of the statute herein, the various statutes and authorities on the subject being considered and discussed. It was a case involving a bill of exceptions, and is, of course, equally authoritative as if a statement had been involved. Among other expressions is found the following: "If a statute absolutely fixes the time within which an act must be done, it is peremptory. The act cannot be done at any other time, unless during the existence of the prescribed time, it has been extended by an order made for that purpose under authority of law." In Wheeler v. Karnes[255] there is a dictum, following a dictum in a former case,[256] which is well

253 See Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Connor v. Southern California etc. Co., 101 Cal. 429, 35 Pac. 990; Higgins v. Mahoney, 50 Cal. 444; Tregambo v. Comanche etc. Co., 57 Cal. 503; Powers v. Lenoir, 22 Mont. 169, 56 Pac. 106. Under the Practice Act, while it required the draft to be filed, the same strict rule applied to filing as is applied to serving under the code: See Munch v. Williamson, 24 Cal. 167; Easterby v. Larco, 24 Cal. 179. This matter as presented by the record, and the conclusions of the court thereupon in the first case cited, appear in the opinion as follows: "Prior to the refusal of the judge to settle the statement, amendments had been proposed to it by the plaintiff, After such refusal, defendant engrossed the statement with the proposed amendments, and presented the engrossed statement to the judge for settlement, and the judge, against the objections of the plaintiff, settled and allowed the statement. The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it. The engrossed statement was then a new statement presented for allowance, and the time for the service of a statement having long passed, the judge was not authorized by the statute to settle and allow it." In Connor v. Southern Cal. etc. Co., 101 Cal. 429, 35 Pac. 990; the court said: "To hold that a statement may be settled when no steps were taken until after the expiration of the ten days, the time for doing so not having been extended, and respondent objecting thereto, would be a judicial abrogation of the statute."

254 57 Cal. 501, 503.

255 125 Cal. 51, 53, 57 Pac. 893, opinion by Commissioner Cooper.

256 Higgins v. Mahoney, 50 Cal. 444.

calculated to mislead for lack of qualification or rather explanation. The court there assumes, rather than states, that a showing in the statement that excuses were offered for failure to comply with the statutory requirement as to time, might be effective for the purpose of avoiding its consequences. The court quoted with approval from the prior case as follows: "The right of the appellant to present a bill of exceptions, after the entry of the judgment, is limited in point of time to the period of thirty days. After the expiration of that period, unless further time had been in the meantime obtained, the right to present the bill of exceptions is taken away. If, therefore, the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant, in answer to the objection, to incorporate into the bill the matter, if any, going to excuse his apparent delay; otherwise, the exceptions, though settled, cannot be considered here." Following the quotation, the court proceeded to say: "In this case, the objection being made, and there being nothing in the bill or record accounting for or excusing the delay, we must follow the rule laid down in Higgins v. Mahoney, supra." But in the case referred to, the intimation that the mere insertion in the bill of matter, explanatory of the delay, is dicta on the face of it. The rule that, in order to obtain relief from the consequences of default, resort must be had to a motion under section 473, had not then been established, as it had when Wheeler v. Karnes was decided. The explanatory matter must, however, appear in the statement or bill, but not in the crude form of mere statements of counsel or affidavits. It should appear in the form of an order of the court made upon the application for relief.

If either the party opposing the application for the relief desires the evidence upon which it is granted, or the party applying in case it is refused desires such order reviewed on appeal from the order on motion for new trial, he may incorporate in the statement the evidence and proceedings thereunder.

It is scarcely necessary to enter into a discussion of the manner of serving statements, amendments, notices of settle-

ment, etc. The general statutory provisions, governing service of notice and papers apply. But there is a peculiarity in the expression used in the respective sections, the one relating to statements and the other to bills of exceptions, which may be properly noticed here.[257] The party may "serve the same, or a copy thereof, upon the adverse party." It is now and here suggested that this was intended to relieve a party desiring such relief of the task of preparing both an original and a copy of the original draft, and that he might, if he chose, serve the adverse party by simply delivering to and leaving with him the original for the period within which he must propose amendments. The Montana court has decided such to be good service under the same statutory provisions as those found in California and other code states.[258] But as there is no other decision directly in point, the above should be received as a suggestion merely.

The statement need only be served upon one of the attorneys of record representing the adverse party. It need not be served upon more than one where there are several representing the same party, if served upon attorneys representing all who are entitled to service.[259] This is a general rule on the subject of service of notices and papers. As the statement or bill follows the notice, the rules governing service of the notice govern here. If the notice of intention has not been served on a party, it would, of course, be idle to serve him with the proposed statement. All questions relating to those upon whom service is to be had should be considered and settled at the time of service of the notice. Supposing, in the instance above noted, there being separate attorneys for individual parties, and one representing all, a notice of intention or of the motion has been served upon all, it would be only fair to follow such service by service of the statement upon all, and a

257 Cal. Code Civ. Proc., §§ 650, 659, subd. 3.

258 Wulf v. Manuel, 9 Mont. 276, 23 Pac. 723.

259 Walsh v. Mueller, 14 Mont. 76, 35 Pac. 226. In this case a firm had appeared generally for all the defendants. Various other attorneys appeared for individual defendants. Held, that service upon the firm and upon none of the others was sufficient: See ante, §§ 359, 372, post, § 536.

failure to do so might, at least, cause delay in bringing on a settlement and hearing.

§ 449. Extension of time—By stipulation.

Reasonable extensions of time by stipulations between counsel, for preparing and serving statements and bills, without the sanction, concurrence or act of the court, have often been recognized as binding and effectual for that purpose and never questioned. And they may extend the time beyond that allowed by the statute and that which it is within the power of the court to add thereto by order. This was decided in Simpson v. Budd,[260] a proceeding for a writ of mandate against the superior court, where the court said: "We are of the opinion that the party may, within the time allowed by the law to give notice of intention to move for a new trial, stipulate that the time for giving such notice may be extended, and that such stipulation has effect without any order of the court ratifying the same. The question in such cases is one which most immediately concerns the parties to the action, and attorneys may be safely intrusted to look after the rights of their respective clients in such matters. The court here only mentions the notice of intention, but the stipulation under consideration was for thirty days from its date within which to prepare, serve, and file a bill of exceptions, notice of motion for a new trial, and statement on motion for a new trial. This stipulation was not filed with the clerk of the court until April 15, 1891, nor was there any order of the court, or of the judge thereof, extending the time within which the act named in the stipulation might be done. The notice of motion for new trial was filed and served within the time given by the stipulation; and within ten days thereafter, to wit, on February 14, 1891, the petitioners prepared and served a proposed bill of exceptions, and the defendants in that action prepared amendments thereto, and the same afterward came before the respondent for settlement. No objection was made by the attorneys for the defendants to the settlement of the bill of exceptions, for the reason that the notice of motion was not given in time, but objection was made to such action upon

260 91 Cal. 488, 491, 27 Pac. 758.

the ground that the copy of said notice served upon them was not signed by the attorneys for petitioners. The respondent refused to settle the bill of exceptions upon the ground that the notice of intention to move for a new trial was not served and filed in time, and that the proposed bill of exceptions was not prepared and presented in time. The court had no doubt of the power of counsel thus to extend the time beyond the statutory period, without filing the stipulation.

§ 450. Extension of time—By order of court.

There are three distinct steps recognized by the Practice Act in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed; First. A notice of intention to move for a new trial; secondly. Serving statement or affidavits, or both; thirdly. The motion for a new trial. An order extending the time for taking either of these steps should express with precision the object to be attained.[261] The full measure of the court's power to extend the time for taking either of the first two steps is the statutes giving such power. The statutes of Montana on the subject may be taken as representative of those of California, and other code states. They provide[262] that when a motion for new trial is made on a bill of exceptions, the party shall have the same time after service of the notice of intention to move for a new trial to serve such bill as is

261 See Jenkins v. Frink, 27 Cal. 337. While the Practice Act of 1851 was in force, the court made the following order—the day after the rendition of judgment: "It is ordered that all proceedings under the judgment recovered by plaintiff against defendants be and they are hereby stayed and superseded until the fifth day of May next, in order that counsel may present and prepare his statement on motion for new trial." Held, that this order did not extend the statutory time within which to file a statement: Bear River etc. Min. Co. v. Boles, 24 Cal. 354.

262 Mont. Code Civ. Proc., § 1173. Similar provision is made in probably all the code states. In Washington it seems that the time limited by statute cannot be extended by the judge except upon notice and for good cause shown or upon stipulation: Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56.

provided after entry of judgment[263]—that is, ten days—and ten days after service of such notice to serve a statement of the case, and in either case the judge may extend the time for thirty days in addition to the statutory time. Under these statutes, it was held that where a judgment was entered on June 9th, notice of intention to move for new trial was served on the 16th, and on the 25th the judge extended the time to serve the bill of exceptions to July 26th, the service of the bill on July 24th was in time, and that it might be used on appeal from the judgment.[264] The order made in that case was void for the excess, but valid within the time named in the statute for which he might grant an extension. It was held that an order allowing a party a given number of days within which to file a statement on motion for new trial must be construed as giving the number of days from the date of the order.[265] But it was held with reference to an order which "extended" the time to give notice of a motion for a new trial thirty days that it should be construed to extend the time thirty days beyond the time given by the statute.[266] And as such orders are liberally construed under the codes, such an order as that made in Jenkins v. Frink[267] would probably now be construed to give the number of days in addition to those already given by law, as to which there would be no purpose or necessity for procuring an order. It is an easy matter, however, to so prepare such orders as to leave no room for doubt.

When the time has been extended by stipulation, the power of the court to extend the time is simply held in abeyance dur-

263 Mont. Code Civ. Proc., § 1155.

264 Whalen v. Harrison, 26 Mont. 316, 67 Pac. 934. To same effect, Doyle v. Gove, 13 Mont. 471, 34 Pac. 846; S. C., 36 Pac. 762; Cottle v. Leitch, 43 Cal. 320. As to extension of time for settlement of bill of exceptions, see Moe v. Railway Co., 2 N. Dak. 282, 50 N. W. 715; Miller v. Way, 3 S. Dak. 627, 54 N. W. 814.

265 Jenkins v. Frink, 27 Cal. 337.

266 Emeric v. Alvarado, 64 Cal. 529, 541, 2 Pac. 418. An order extending the time within which to prepare a statement on motion for a new trial carries with it the same extension of time to serve the statement: Bryant v. Sternfeld, 89 Cal. 611, 26 Pac. 1091.

267 27 Cal. 337.

ing the period covered by the stipulation; and where the time for the preparation of a statement on motion for a new trial has been extended by stipulation between the parties, the court has power to grant a further extension, not exceeding thirty days, if the application therefor be made before the time as extended by stipulation has expired.[268]

The same liberality of construction prevails in determining the date to which such orders run. It was held that, if the time for filing a statement on motion for a new trial, or for doing any act of court practice, is extended "to" a certain date, the date named is included within the period prescribed.[269] It would appear that in Muir v. Galloway,[270] the judge had attempted to extend the time eleven days by the last order, and thirty-one days by the three orders; but the court held otherwise. As the intervention of Sundays and other holidays is liable to present the same question again, it may be worth while to state the case in some detail. October 20, 1880, the verdict was rendered. Notice of intention to move for new trial was filed and served by defendants October 29th. November 8th defendants obtained from the judge of the court below an order granting ten days from date in which to prepare and serve their proposed statement on motion for new trial. On November 18th, another extension of ten days was granted by the judge. November 28, 1880, was Sunday; November 27th, the judge made an order allowing defendants

268 Curtis v. Superior Court of Yolo County, 70 Cal. 390, 11 Pac. 652.

269 Penn. Placer Min. Co. v. Schreiner, 1 Mont. 121; State v. Benson, 21 Wash. 365, 58 Pac. 217. Under an order made in term, setting a motion for a new trial for hearing on a day named in vacation, "or such other time as the court may hereafter fix," and directing that it "be heard at chambers, and that movants have until the hearing to make out and perfect their brief of evidence, and file the same without prejudice, and that at the said hearing all things may be done, to all intents and purposes, as if the said case was heard and determined at and during the present term of the court," the movants had, until the hearing actually took place, the right to present a brief of evidence and have the same approved and filed: Hightower v. Brazeal, 101 Ga. 371, 29 S. E. 18. See, also, Brunswick Light etc. Co. v. Gale, 91 Ga. 813, 18 S. E. 11.

270 61 Cal. 498.

ten days further time from November 29th, within which to prepare and serve their proposed statement. The proposed statement was on December 9, 1880, served on plaintiff's attorney without waiver by him as to time of service. It was held (1) that the orders of the judge did not extend time for preparing and serving the statement more than thirty days; (2) that the last day of the period of extension fixed by one of the orders being Sunday, it was not to be computed as any portion of the time granted by the order, but was a supplement was served in time. The soundness of this decision mentary day superadded by law; (3) that the proposed statemay well be doubted in view of the criticism of it in a later case, in which, however, the court did not pass upon the point.[271] It is well settled, however, that an order extending time is of no force after the lapse of time fixed by law or previous extensions granted by the court,[272] and this holds good even though had the application been made earlier the court still had power to have given a further extension.[273]

271 Reay v. Butler, 99 Cal. 477, 480, 33 Pac. 1134.

272 Bunnel v. Stockton (City of), 83 Cal. 319, 23 Pac. 301; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Cameron v. Arcata etc. R. R. Co., 129 Cal. 279, 61 Pac. 955; Freese v. Freese, 134 Cal. 48, 66 Pac. 43; Doyle v. Gore, 13 Mont. 471, 34 Pac. 846.

273 Freese v. Freese, 134 Cal. 48, 66 Pac. 43; Clark v. Crane, 57 Cal. 629. Under the Washington code a motion for an extension of time to file a statement of facts, need not be made within the thirty days next succeeding the entry of judgment: Crowley v. McDonough (Wash.), 70 Pac. 261; Ballinger's Ann. Codes & Stats., § 5062, "it is also essential that any order extending the time shall be made before the party seeking such extension is in default. If he permits the time within which he may act to elapse without acting, any subsequent order giving him time to act will not avail to revive his right to do the act"; Freese v. Freese, supra. In Bunnel v. Stockton, 83 Cal. 319, 320, 23 Pac. 301, the court said: "The motion for a new trial was properly denied, for the reason that no statement of the case was filed in time. The code requires that the statement be served within ten days after the service of notice of intention to move for a new trial: Code Civ. Proc., § 659, subd. 3. The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or if settled cannot be considered either at the hearing of the motion or on appeal to this court: Quivey v. Gambert, 32 Cal. 304, 309; Chase v. Evoy, 58

The same rule of law, in this regard, applies to bills of exceptions as to statements.[274]

The judge who tried the case, though from another county, may make the order extending time,[275] though any judge of the court in which the case was tried may also make it.[276]

Cal. 348; Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388. The time allowed by section 659 may be extended by the court or judge, but not longer than thirty days, without the consent of the adverse party: Code Civ. Proc., § 1054. In this case the judge of the court below extended the time for the full thirty days, and then, upon a stipulation of the adverse party, extended it an additional twenty days, and then again, without the consent of the adverse party, gave the appellant another twenty days, and the statement was not filed until the last day of the last extension of time. This was too late. The judge of the court below exhausted his power when he extended the time thirty days, and the last extension by him was unauthorized. The fact that the respondent had consented to one extension of time beyond the thirty days did not give the judge any additional authority."

274 Stonesifer v. Armstrong, 86 Cal. 594, 596, 25 Pac. 50.

275 Farleigh v. Kelly, 24 Mont. 369, 62 Pac. 495, 685. Same principle, Matthews v. Superior Court, 68 Cal. 638, 10 Pac. 128. See Cal. Code Civ. Proc., § 1004, providing that "orders made out of court may be made by the judge of the court in any part of the state"; Ex parte Nelson, 62 Ala. 376; Gould v. Duluth & Dakota El. Co., 3 N. Dak. 96, 54 N. W. 316; Holden v. Haserodt, 2 S. Dak. 220, 49 N. W. 97, 3 S. Dak. 4, 51 N. W. 340.

276 Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938; State v. Benson, 21 Wash. 365, 58 Pac. 217. In the first of these cases one of the grounds urged for dismissal of the appeal was: "Because the time for filing the statement of facts was extended by a judge who did not preside at the trial of the cause and the same was extended without any authority under the law." As to which the court said: "We think the order extending the time was authorized by the terms of sections 4669, 5062 of Ballinger's Code, section 5062, provides that such extension may be made 'by an order of the court or judge wherein or before whom the cause is pending or was tried.' It seems to us clear that the statute contemplates that either the court wherein the cause is pending or the judge before whom the cause was tried may extend the time: State ex rel. Bickford v. Benson, 21 Wash. 365, 58 Pac. 217. One of the judges presiding over the superior court of King county entered the order extending the time, but he was not the judge who tried the cause. The statement of facts itself is, however, duly certified by the judge

And such judge from another county may make the order in the county in which he resides.[277] It appears to be unnecessary, in the absence of a statutory provision requiring it, to either file or serve an order extending time. In Swift v. Corcoran,[278] a party had obtained an order extending time to file an answer to a complaint, but neither filed nor served it on the opposite party. During the period given by the order, but after the time given by law for answering had expired, the plaintiff took judgment by default. On defendant's motion, and production of the order, the court made an order setting aside the default, and allowed an answer to be filed. Upon appeal from this order the court affirmed it saying: "The more correct practice certainly is to file or serve the order extending the time to answer. But we are not aware of any provision of law requiring it to be filed or served." This decision would be held equally applicable to orders extending time for any purpose. Generally, however, there will be found rules of court on the subject. A common provision of such rules is that orders must be filed on or before a given day after being made, the hour of the day being sometimes named, and that if not so filed, they shall be void, or of no effect. They usually also require in cases of orders extending time, service of the orders, prior to the time for doing the thing for which the time is extended would expire in the absence of an order. The terms and provisions of such rules should be held to enter into and constitute a part of each order made by the court where they are in force. But aside from any law or rule of court requiring it, it is due to opposing counsel that they be served, as such service may dispense with the doing of acts under the presumption that the prosecution of the proceeding has been abandoned.

who tried the cause. The motion to dismiss the appeal is in all particulars denied."

277 Matthews v. Superior Court, 68 Cal. 638, 10 Pac. 128, as to when the order may be made by a court commissioner, see Carillo v. Smith, 37 Cal. 337.

278 47 Cal. 86. Approved and followed in Elliot v. Whitmore, 10 Utah, 258, 37 Pac. 463.

§ 451. Relief on motion from failure to serve or obtain extension.

It was held in Campbell v. Jones[279] that when a judge by oversight had failed to have entered in the minutes of the court an order extending time, as he had promised to do, the time was not extended. There was not, however, any intimation in the decision that by proper showing upon motion the party could not have been relieved on the ground of inadvertence or excusable neglect. But it is at present well settled that where the failure of a party to procure additional time in which to prepare and serve his proposed statement on motion for a new trial is the result of excusable neglect or mistake, the court has power to relieve him from the effect thereof, and whether it is the result of such mistake or excusable neglect is to be determined in the exercise of its discretion by the court to which the application is made.[280] This is simply an extension to such cases of a general principle.

§ 452. Proposal of amendments—Herein of waiver of service in legal time.

It appears to be well settled that the objection that a proposed statement is not served in time as well as that the notice was not served in time, must be reserved before or at the time of offering amendments thereto, and that if not so reserved,

279 41 Cal. 515. See, also, Clark v. Strouse, 11 Nev. 76, to the point that such orders must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute.

280 Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114. Citing and following Stonsifer v. Kilburn, 94 Cal. 33, 29 Pac. 332. In the first of the above cases the court said: "If the failure of the plaintiff to procure the additional time was the result of an excusable neglect or mistake, the court had the power to relieve him from the effect thereof, and whether it was the result of such mistake or excusable neglect was to be determined in the exercise of its discretion by the court to which the application was made. The facts stated in the order must be accepted by us as having been fully shown to the court by competent evidence, and upon these facts it must be conceded that the court acted in the exercise of a wise discretion in making the order."

such objection is forever waived.[281] But it was held that the giving of a notice declining to allow amendments to a proposed statement did not operate as a waiver of the objection that they had not been filed in time.[282] The court reasoned that at the stage at which the notice of nonacceptance was

281 Beach v. Spokane etc. Water Co., 21 Mont. 187, 53 Pac. 493. On question of waiver, see also, Walsh v. Mueller, 14 Mont. 76, 35 Pac. 226; Sehl v. Graves, 14 Mont. 341, 36 Pac. 354; Savings and Loan Assn. v. Moore, 68 Cal. 156, 158, 8 Pac. 824. But by merely agreeing to submit a motion for a new trial without the statement having been settled or authenticated, the party resisting a new trial does not waive his right to object to the want of a properly authenticated statement: Cosgrove v. Johnson, 30 Cal. 509. See Munch v. Williamson, 24 Cal. 167, where it was held, that a minute entry as follows: "Now, on this day, in open court, comes on to be heard defendants' motion for a new trial; and thereupon, after having heard the arguments of counsel, the court overrules the same, to which ruling of the court defendants, by counsel, except"—did not show an appearance of the counsel of the plaintiff at the argument of the motion, and therefore did not show a waiver of the objection to the filing of the statement. As to waiver of fact that proposed statement was not signed by the moving party by admitting service without objection, see Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906.

282 State ex rel. etc. v. Cheney, 24 Nev. 21, 22, 228, 52 Pac. 12. The reasoning upon which the conclusion was reached in this case was in part as follows: "It is not necessary to discuss the proposition that such right might be waived, but we are of the opinion that the facts shown do not make such a case as would justify the court in so holding. It appears that the bank took such steps as it was authorized by law to make its proposed statement a part of the record, and that the objection to the proposed amendments, for the reason that the same were not filed within the time required, was made at the first opportunity. It can hardly be said that making an objection to the allowance of the proposed amendments, in the manner and at the time required by statute, would operate as a waiver of a right to make further objections to the amendments, which could only be made at a subsequent time and which were made at the first opportunity. The bank, as shown by the record, used due diligence in its attempt to preserve all its rights. If the statute had required the bank to make the objection to the proposed amendments, that the same had not been filed within the time required, in other manner and at other times than it was made, and had failed in that respect, then there would be merit in relator's contention."

given, objection was premature; that the first opportunity to object to amendments is afforded at the settlement.

§ 453. Bringing on settlement—Notice of time and place of settlement.

No less important than the preceding steps in the process of perfecting a statement or bill is the final act that in which the court participates and wherein the court controls. It is the duty of the party moving for a new trial to prosecute the motion, and it is not the duty of the party who has served his proposed amendments to the other's statement to take any further proceedings toward its settlement.[283]

283 Doon v. Tesh, 131 Cal. 406, 63 Pac. 764. For a case of failure to proceed with due diligence, see Moore v. Kendall, 121 Cal. 145, 53 Pac. 647. In case a statement of facts has been stricken from the record on appeal, for the reason that the same was settled by the judge trying the cause after the expiration of his term of office, a new trial will not be granted appellant, where he has two months between the rendition of judgment and the expiration of the judge's term in which to have the facts settled, and where he made no application to the superior court, after the judge trying the cause, had gone out of office, to have the facts settled by the court: Gunderson v. Cochrane, 3 Wash. 476, 28 Pac. 1105. The relative duties of the parties was very clearly stated in the first of the above cases, as follows: "When a motion for a new trial is to be made on a statement of the case, the moving party must serve the proposed statement on the adverse party within a certain time and if the statement is not agreed to by the adverse party, the latter must, within a certain time serve his proposed amendments. If the amendments are adopted, the statement shall be amended accordingly, and then presented to the judge for settlement; if not adopted, the moving party must present the proposed statement and amendments to the judge (Code Civ. Proc., § 659, subd. 3); and thereupon the proceedings for the settlement of the statement shall be taken by the parties as are required for the settlement of bills of exceptions by section 650. This latter section requires the moving party to present the proposed bill and the amendments to the judge who heard the case, and it becomes the duty of the judge to fix the time to settle the bill and notify the parties, and he must then settle the bill. If he should neglect or refuse to do so, the party desiring the bill settled may then come to this court and have the bill settled: Code Civ. Proc., § 652. Section 660 requires an application for a new trial to be heard, after the statement is filed, 'at the earliest practicable period after notice of the motion; . . . . and may be brought to a hearing

The settlement of the statement or bill by stipulation of counsel which was once not only tolerated but expressly sanctioned by statute, is no longer permissible in California. To a limited extent, it is otherwise in Nevada and some other states.[284] A statement or bill not settled or allowed and authenticated by the judge as being such, must be disregarded.

The proceeding for initiating this final act of settlement is clearly pointed out by statutes and code provisions where, as in California the participation of the court is required. The provisions thus enacted must be substantially complied with. The practice in California has varied under amendments made from time to time. At one time the original statement, if not agreed to, could be filed and then presented for settlement without notice to the adverse party. At a later period it had to be filed in addition to giving notice of the time and place of settlement.[285] At present, it is retained in the possession of the attorney proposing it until the time has passed for the proposing of amendments by the opposite party, or until amendments are proposed. If any are served, notice of a time and place of settlement is required. If none are proposed or served within the time given for them by the code, no notice is required to be given to the other party and the judge may make the settlement without notice.[286] The Cali-

upon motion of either party' after the statement is filed. In the present case the proposed statement was served, and so also were proposed amendments, but there the proceedings ended. Whether the proposed amendments were adopted or not it was the duty of the moving party to present the statement and amendments to the judge. Defendants did all they were required to do when they presented their proposed amendments. They have no opportunity to call up the motion for a hearing, as the statement was not filed with the judge.''

284 See Nevada Rev. Laws (Cutting), § 3292; also, State ex rel. v. Cheney, 24 Nev. 222, 52 Pac. 12, for explanation of proper practice in that state.

285 Barbaires v. Gregory, 64 Cal. 230, 30 Pac. 805. This case holds that the mere fact that the movant inadvertently files the statement pending a settlement thereof on his notice does not affect the relative rights or responsibilities of the parties.

286 Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Home Savings etc. Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Bruce v. Foley, 18 Wash.

fornia Code of Civil Procedure provides two methods of bringing on a settlement. These methods are distinctly prescribed—that for bills of exceptions in section 650, and that for statements in subdivision 3 of section 659. The provisions are identical in meaning, and literally almost identical. Either method, of course, may be resorted to, but that of giving direct notice of a time and place of settlement is usually the most convenient and satisfactory, inasmuch as the judge and clerk usually expect the attorney to attend to the preparation and service of the notice, or otherwise sometimes neglect it, causing delay, annoyance and uncertainty.

There are special requirements with respect to the notice. It is a common practice to add to the designation of a time and place of settlement a statement to the effect that amendments which have been served are rejected, or accepted, or that some are rejected and others accepted. But no such additional matter is necessary.[287] But if the moving party

96, 50 Pac. 935. Under Laws 1893, page 115, providing if no amendment to appellant's statement of facts is made within ten days after it has been filed and served, such statement may be certified at the instance of either party, a notice to respondent that appellant would apply to the court to certify his statement is without force, where no previous service of such statement was made on respondent: Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241.

287 Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685. The practice on settlement, and proceedings preliminary thereto in Nevada differ somewhat both from the present and the former practice in California: See Nevada Comp. Laws (Cutting), § 3292; State ex rel. v. Cheney, 24 Nev. 222, 52 Pac. 12. In the first case cited the court said: "The point that petitioner did not notify plaintiff in the said action of his refusal to adopt the amendments, and that he thereby elected to adopt them, cannot be maintained. The code provides for no method of signifying a refusal to adopt other than the delivery of the statement and amendments to the clerk or judge." In the same case the court gave the following explanation of the proper practice under the code provisions governing herein (after quoting sections 659 and 650 of the Code of Civil Procedure): "The obvious purpose of these provisions is, that the parties may have notice of the time when the statement will be settled. When the statement and amendments are presented directly to the judge, there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore,

fails either to deliver the statement and amendments to the clerk, or to give notice of presentation to the judge for settlement, and after the time for such delivery or notice has expired, proceeds to have the same settled by either method, he is presumed to have accepted and adopted, subject, of course, to the revisory power of the judge, all such proposed amendments.[288] In such case the question of adoption or non-adoption cannot arise if the adverse party urges the objection that the proceeding has lapsed by reason of such failure to deliver or give notice. Whether the presumption would hold good in case the movant was relieved from his default by motion under section 473 appears not to have been decided. It stands to reason, however, that he would be so relieved, since the presumption is simply a consequence of the default from which he seeks relief.

But where the party who prepared a statement failed either to present it to the clerk for the judge within ten days, together with amendments which had been proposed by the opposite party, or to give notice of a time and place of settlement, and the opposite party, instead of taking advantage of such failure to object to any settlement, himself took steps to have the statement settled and his proposed amendments incorporated in the settled statement, it was held that the party thus in default should be presumed to have adopted said amendments.[289]

the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659, qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge."

[288] Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63; Black v. Hilliker, 130 Cal. 190, 192, 62 Pac. 481. There is a strong intimation in the opinion in this last case, to the effect that a notice of rejection of amendments is necessary in all cases in order to escape the presumption mentioned in the text. It should be regarded as obiter dictum and erroneous.

[289] Black v. Hilliker, 130 Cal. 190, 192, 62 Pac. 481.

Five days' notice to the adverse party of the presentation of a proposed statement or bill of exceptions, and the amendments thereto, to the judge for settlement, pursuant to section 650 of the California Code of Civil Procedure, is essential to the validity of the presentation. Subsequent notices of the fact of presentation after it has been made, and of a time for settlement, are too late; and, in such case, it is error for the judge to settle the statement or bill against the objection of the adverse party.[290] But objection to a defective notice of settlement of a bill of exceptions, which failed to specify that the proposed amendments would be presented to the judge with the bill, is waived, if the bill and amendments were in fact presented to the judge in the presence of both parties at the time specified, and the hearing was postponed from time to time by consent, and without objection urged prior to the final hearing.[291]

"If no amendments are served, or if served, are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement, without notice to the adverse party."[292] Identically the same language is employed with reference to the statement where no amendments are served or if served are adopted.[293] It will be observed that neither a bill nor statement is to be delivered to the judge simply for authentication, but for settlement. It is the duty of the latter to settle the statement. The duty is cast upon him by the statute to settle it, the true meaning of which has been previously explained.[294] In Santa Ana (City of) v.

290 Witter v. Andrews, 122 Cal. 1, 54 Pac. 276. See Burns v. Napton, 26 Mont. 360, 68 Pac. 17; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Sell v. Graves. 14 Mont. 341, 36 Pac. 354.

291 O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511. Where appellant's notice of filing the statement of facts fails to name the place at which he will ask its settlement, as required by Code of Procedure, section 1422, a motion to strike the statement on appeal will be sustained; Merchants' Nat. Bank v. Ault, 14 Wash. 701, 44 Pac. 129; Kroenert v. Gustafson, 19 Wash. 373, 53 Pac. 340.

292 Cal. Code Civ. Proc., § 650.

293 Cal. Code Civ. Proc., § 659, subd. 3.

294 Ante, § 445.

Ballard,[295] the court said: "It is the duty of the judge to settle a bill of exceptions or statement when properly presented, and, if it contains redundant or useless matter, it is his duty to strike it out or order it to be stricken out, whether the parties assent thereto or not, and to make the statement truly represent the case." He may, of course, and sometimes does, of his own accord, fix a time and place for settlement and bring the attorneys of the respective parties before him for that purpose notwithstanding their agreement between themselves. But he is not required to notify either party.[296] In case of no amendments being served, or of the acceptance of all those served, the code fixes no time within which the bill or statement is to be presented to the judge. In such case a reasonable time is allowed to be determined according to circumstances.[297]

Service of the statement within legal time may be waived in many ways not necessary to enumerate or mention. But the opposing party in the motion may propose and serve amendments to a statement, or bill, which has not been served in time without waiving his right to object that the same was not served in time, by a preface that he does so without preju-

295 126 Cal. 677, 678, 59 Pac. 133. In Leach v. Pierce, 93 Cal. 618, 29 Pac. 235, which was a proceeding for writ of mandate, the court said: "Of course, the exercise of respondent's discretion cannot be controlled or reviewed in this proceeding. He cannot be compelled to settle any particular bill or to insert or exclude any particular facts; but if the petitioner is entitled to move for a new trial, and has taken the proper steps within time, or if she had tendered a bill of exceptions to be used on appeal from the order within the time allowed by law, respondent cannot refuse to settle and sign a bill containing a record of the proceedings. It is an act which the law requires him to perform—a duty resulting from his office"; See, also, Winters v. Buck, 121 Cal. 279, 53 Pac. 799.

296 Wulf v. Manuel, 9 Mont. 276, 23 Pac. 723.

297 See Woodard v. Webster, 20 Mont. 279, 50 Pac. 791, holding also that delay of fifty-seven days unreasonable, and being unexplained fatal to an order granting a new trial: Miller v. Hunt (Idaho), 63 Pac. 803. See to same effect, Connor v. Railroad Co., 101 Cal. 429, 35 Pac. 990; also Warden v. Mendocino County, 32 Cal. 655, holding that a reasonable time to prepare and file amendments to a statement on motion for a new trial is five days.

dice to his right to object at the hearing to the statement on these grounds. No particular form of reserving the objection is required. In some form, however, the objection that the proposed statement was not served in time must be reserved.

§ 454. Proceedings before judge or referee at settlement—Appearance and nonappearance of parties.

Having given notice of the time and place of settlement, or if the statement and proposed amendments have been left with the clerk for the judge, the latter has fixed a time and place, it is usually to the interest of the party proposing the statement or bill to be represented at the settlement.

No case can now be cited in which it was distinctly held that the proceeding entirely lapsed by a persistent failure of either or both parties to be represented at the settlement, though the provisions requiring notice to the adverse party in the one form of presentation and to both parties in the other form, suggests at least the propriety of their attendance. It is certain, however, that the party adverse to the moving party is under no legal obligation to attend. Unless, however, the settlement is a very simple matter or there is no difference in fact between counsel as to what the statement or bill should contain, nor any room for a difference between counsel and the judge, it is difficult to see how it is practical for the latter to proceed with the settlement in the absence of the movant. The judge is not supposed to make the necessary additions insertions and eliminations, but merely to direct them to be made. There is no legal reason, however, why he may not do so if he prefers to do so. And the judge may settle the statement although the moving party abandons it.[298]

§ 455. Proceedings before judge or referee at settlement—Waiver of neglect.

If the party adverse to the movant fails to attend the settlement, he takes the risk of a failure of the judge to take cognizance of any lapse in the proceeding and for such reason to

298 Black v. Hilliker, 130 Cal. 190, 192, 62 Pac. 481. When abandonment of motion presumed: Darke v. Ireland, 4 Utah, 192, 7 Pac. 714.

refuse to settle the statement. The court should, perhaps, upon the fact of a clear lapse in any respect coming or being called to its attention refuse, of its own motion to proceed with the settlement. But if it does not, and allows and certifies the statement, without inserting therein the facts constituting such lapse, all right of objection thereto, for that cause, is gone.[299]

It was formerly held in California that if the order denying a motion for a new trial stated that the motion was submitted upon the statement and affidavits by consent of the respective attorneys, the respondent was precluded in the appellate court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served.[300] But that doctrine cannot be considered sound under the code, if indeed it was ever so. Counsel may appear at the hearing of the motion for the purposes of argument, but there is no way provided for making the character of argument there presented appear in the record. The argument may consist principally or entirely of objections to the granting of the motion based on the failure to serve the notice, or statement, or to take some other step within legal time. And

299 Vilhae v. Biven, 28 Cal. 409; also ante, §§ 382, 383. The court here said: "The statute does not specify the time in which proposed amendments to a statement prepared and filed to be used on motion for a new trial shall be made or filed. As the statute is silent on the subject, the practice in such cases must necessarily be regulated by the court. In respect to the service of proposed amendments or a copy thereof, the statute makes no provision. The statute provides that when the moving party's statement is not agreed to by the adverse party, it shall be settled by the judge upon notice. The appellants do not show that the statement was not settled by the judge upon notice, but they say the engrossed statement was never submitted to them or their counsel, and that they, as well as their counsel, were wholly ignorant of its existence. It was to be presumed the judge was judicially satisfied that defendants' counsel had notice of the time and place when and where the statement would be settled. If, after having had notice, the defendants' counsel neglected for any cause to attend before the judge upon the settlement of the statement, or afterward remained ignorant of the existence of the engrossed statement, they have no cause of complaint. They must bear the consequences of their own negligence."

300 Millard v. Hathaway, 27 Cal. 119.

if such argument does not prevail, the motion must necessarily be submitted on the statement. Consent is entirely immaterial. Moreover, a party who claims the benefit of waiver of a failure to file the statement in due time must prove it beyond doubt, and not leave it to be ascertained by conjecture or doubtful inference.[301] At any rate, it is well settled that such lapses are not waived by participation of counsel in the argument at the hearing.[302]

§ 456. Proceedings before judge or referee at settlement—Objections, excuses and explanations, how made to appear—Proper practice herein.

There has been in times past great uncertainty and almost endless discussion, as well as considerable conflict of judicial opinion, pertaining to various questions which arose in connection with the immediate act of settling the statement. The questions which arose pertained principally to the power and duty of the court where objections were made to the settlement and the proper practice in dealing with and disposing of such objections, as well as the remedies of the parties—of the movant if the objections were sustained on the one hand, and of the adverse party, if they were overruled on the other. The whole subject will be here discussed under two heads: First, rights and remedies of the moving party; secondly, rights and remedies of the opposition. In the first place, if the movant considers that the objections are well taken, that is an end of the matter so far as his motion rests on a statement or bill of exceptions. The statutes describe the statement or bill as the record upon which certain grounds for the motion may be heard. It is one proposed, served, settled, allowed, engrossed and filed as therein prescribed, without which there is no record before the court upon which to be heard, and none upon which to appeal. In case the party proposing the statement or bill anticipates objections which are prima facie sufficient to justify a refusal to settle the statement or bill, or in case such objections are made, and they appear to him to be well taken,

301 Munch v. Williamson, 24 Cal. 167: State ex rel. Keane v. Murphy, 19 Nev. 96, 6 Pac. 840.

302 See Baumer v. French, 8 N. Dak. 319, 79 N. W. 340.

notwithstanding that the court may overrule them, and yet reasons exist upon which he may rely to obviate the objections by proceeding by motion under section 473 of the California Code of Civil Procedure, he may, pending the settlement, apply for relief under that section.[303] The order made on such application is itself appealable, as one made after judgment.[304] But the usual and proper practice is to make the motion, and obtain an order broad enough to cover not only the special matter of granting relief from the inadvertence, mistake, etc., but the other matter to which the application is merely incidental, and prosecute the appeal from such order, which includes the order refusing to settle the bill or statement. Such was the course pursued in Stonesifer v. Kilburn,[305] in which the order appealed from was (after certain recitals) that "the said motion be, and the same is, for the reason aforesaid, hereby denied, and the application for settlement of the said bill of exceptions is refused." The proceedings on the motion for new trial in case of the denial of the motion are suspended until the appeal is disposed of; and if the supreme court reverses the order, it will, as it did in the case just cited remand the cause for further proceeding.

303 See Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682, holding the relief could not be granted after six months; Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850, strong showing required to authorize interference with discretion of trial judge; Jugsin v. Epperson, 137 Cal. 370, 70 Pac. 165, holding party had not shown his neglect excusable.

304 Cal. Code Civ. Proc., § 939.

305 94 Cal. 33, 42, 29 Pac. 332. See Haehnan v. New York D. G. Co. (Idaho), 67 Pac. 796; Idaho Rev. Stats., § 4441, subd. 3. In Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176, the doctrines of the decisions on the subject was reviewed in an opinion of the court in bank by Chief Justice Beatty, denying a motion to dismiss. The appealability of orders under section 473 was reaffirmed as was the nonappealability of orders refusing to settle statements and bills of exceptions. The opinion was in part as follows: "In the printed briefs the motion to dismiss is based upon two grounds: 1. That the refusal to settle a statement is not an appealable order, and, a fortiori, that a refusal to vacate such an order cannot be appealable; and 2. That if a refusal to settle is appealable the appeal must be taken therefrom directly, and cannot be prosecuted from the order in question herein, which, it is claimed, is in substance merely a re-

If an order denying the application and settlement be affirmed on appeal, that ends the matter in so far as concerns the motion based upon the bill or statement. In case the

fusal to set aside an order itself appealable. In the oral argument respondent abandoned the first proposition, and contended, on the authority of Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50, and of Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, that the refusal to settle a statement is an appealable order. We regard those decisions, however, as resting upon a ground which distinguishes them from a long series of earlier and later decisions in which we have held that mandamus is the proper and exclusive remedy when a trial judge refuses to settle a statement which it is his duty to settle; that is to say, in a case where the moving party has strictly and fully complied with the requirements of the statute in proposing and presenting the statement for settlement: See Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63; Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535. These decisions we consider decisive of the proposition that a wrongful refusal to settle a statement is not the subject of appeal, but is to be corrected by a writ of mandate. But when the party seeking the settlement has not strictly and fully complied with the statutory requirements and appeals to the court for relief upon the ground that his failure has been caused by surprise, accident or excusable neglect, and when necessarily the granting of relief rests in the sound discretion of the court, a different case is presented. In such a case the mandamus is a wholly inadequate remedy, because the discretion of the trial court may not be coerced: Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50. Its exercise of discretion may, however, be reviewed on appeal from the order denying relief: Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Banta v. Siller, 121 Cal. 414, 53 Pac. 935. The last cited case was in every essential particular the exact parallel of this, the only difference being, that there the motion for relief was granted by the trial court, and the statement settled. The motion for a new trial was, however, denied. On appeal from the latter order both orders were reviewed, the former affirmed and the latter reversed. In the case of Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497, an appeal from an order granting relief on the ground of excusable neglect, and settling a statement was dismissed upon the ground that it was reviewable only upon an appeal from an order granting or refusing a new trial. This was in accordance with numerous decisions of this court based upon the obvious distinction between the effect of settling and refusing to settle a statement on motion for a new trial. The latter is necessarily final, and must be corrected, if at all, by mandamus, where it

application is granted and the settlement consummated the movant may proceed with his motion. Whether the opposite party may by appealing from such order suspend the proceedings on the motion is a question presently to be considered. On the other hand, if the movant considers that the facts shown by the opposition do not make a prima facie showing of a fatal lapse, he need not resort to an application for relief under section 473, nor, if the judge considers the objections sufficient and refuses to make settlement, undertake to appeal from such ruling, but should petition the supreme court for a writ of mandate, or in case the matter is before a referee he may apply to the superior court for relief. The question of the appealability of the ruling on objections was long an unsettled and much controverted one which has been at length settled so as to conserve the convenience of parties to the litigation and promote justice. It was declared in Whipple v. Hopkins[306] that, although the action of the lower court in refusing to settle a bill of exceptions, from which an appeal had been taken along with appeals from the judgment and from an order denying a new trial, had been discussed in the briefs, the court did not wish to be considered as holding that the order was appealable. The court then proceeded to assign reasons of such general scope that, if literally accepted and without qualification, would render the decision directly conflicting with the cases of Stonesifer v. Kilburn. But the cases are, in their facts, clearly distinguishable. The important fact should not be lost sight of that, in cases showing a lapse on the face of the proceeding, like Stonesifer v. Kilburn, unless an appeal be permitted, the movant has no remedy for an arbitrary or erroneous refusal to settle his bill or statement. The context shows that the remark was meant more as an expression of the ordinary inutility and inadequacy of an appeal

will lie, or by an appeal, where mandamus is not available. The former is but an intermediate step in the proceeding which culminates in an order granting or refusing a new trial, and can only be reviewed on appeal from the final order. There is no want of harmony in these various decisions if the plain distinction between the cases is observed, and the right of defendant to prosecute this appeal is clearly sustained by the decision in Stonesifer v. Kilburn, Banta v. Siller, and Kaltschmidt v. Weber, supra."

306 119 Cal. 349, 351, 51 Pac. 535.

than that for which it literally stood. The remedy by appeal was in California first denied, then declared to be the appropriate remedy, then doubted, then held inadequate as compared with the more effective and speedy remedy by mandamus,[307] since which it has almost entirely gone out of use.

But notwithstanding the incidental and somewhat irrelevant character of the expression in Whipple v. Hopkins, as to the nonappealability of such orders, it was viewed seriously and reiterated in a subsequent case.[308]

A rehearsal of all the reasoning by which various and sometimes inconsistent conclusions were reached as to the proper practice herein would prove to be tedious reading and of no value. Those desiring to trace the judicial history of the subject should begin with the elaborate and learned opinions in some of the earlier cases, large parts of which had reference to statutory provisions that have been superseded or considerably modified by existing code provisions.[309]

The inadequacy of the remedy by appeal was thus pointed out in Careaga v. Fernald:[310] "It is plain that an appeal from the action of the referee refusing to settle the statement, conceding the right of appeal existed, would not have afforded the defendant an adequate remedy; for if on such appeal the order should be reversed, it would not secure the aggrieved party the right erroneously denied him, namely, the settlement of the statement. The referee might still refuse to settle it, and defendant at last be compelled to resort to mandamus."

307 Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615; Machada v. Kenney, 135 Cal. 354, 67 Pac. 331; Leach v. Pierce, 93 Cal. 618, 29 Pac. 235; Winters v. Buck, 121 Cal. 279, 53 Pac. 799; Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Malcomson v. Harris, 90 Cal. 262, 27 Pac. 206; Clark v. Crane, 57 Cal. 629; Santa Ana (City of) v. Ballard, 126 Cal. 677, 59 Pac. 133; In re Application of Plume, 23 Mont. 41, 57 Pac. 408; Keane v. Murphy, 19 Nev. 89, 95, 6 Pac. 840. But unreasonable delay will bar the application for the writ: McConoughey v. Torrence, 124 Cal. 330, 57 Pac. 81.

308 Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176. An extensive quotation from the opinion will be found in a preceding note.

309 See Quivey v. Gambert, 32 Cal. 304; Calderwood v. Peyser, 42 Cal. 110.

310 66 Cal. 351, 353, 5 Pac. 512.

But the case of an order made after, or in conjunction with, a resort to the provisions of section 473 is clearly distinguishable from one made simply upon the presentation of objections to the settlement without such resort. In the former case mandamus cannot be resorted to; and if the judge denies the application for relief and persists in his refusal to make settlement, the movant must either abandon the proceeding or appeal. In Stonesifer v. Armstrong,[311] a writ of mandate against the judge of the superior court to compel him to settle a bill of exceptions in the case of Stonesifer v. Kilburn, notwithstanding his order, before quoted, was applied for and refused because the decision upon the application involved the exercise of discretion and the decision of an issue of fact as well as one of law, and that if the court erred or abused its discretion, its action could be reviewed on appeal. The moving party, upon the denial of his application for the writ, appealed from the order. It was objected by the respondents that the order was not appealable, citing certain early cases. But the court said the cases cited had been overruled on the point to which they were cited.[312] The respective uses of the two remedies was again pointed out in Hicks v. Masten,[313] when a writ of mandate was applied for and granted, and the court, after a reference to the cases above cited, said: "In those cases the bill of exceptions was confessedly not prepared in time, and the moving party applied to the court below to be relieved upon the ground of mistake and excusable neglect; and, as that question was one requiring the exercise of judicial discretion, it is obvious that mandamus would not lie requiring the court to relieve against the mistake or neglect, and that an appeal was the proper remedy." If notwithstanding an order relieving the movant from his default the bill or statement, at the request of the opposition is made to show

311 86 Cal. 594, 25 Pac. 50.

312 Stonesifer v. Kilburn, 94 Cal. 33, 42, 29 Pac. 332. The overruling authorities referred to by the court are: Calderwood v. Peyser, 42 Cal. 110; Morris v. De Celis, 41 Cal. 331; Dooly v. Norton, 41 Cal. 440; Clark v. Crane, 57 Cal. 630; Empire Co. v. Bonanza Co., 67 Cal. 406, 7 Pac. 810.

313 101 Cal. 651, 654, 36 Pac. 130.

the default and his objections, the movant should see that in also contains at least the substance of such order with sufficient recitals to show that it was made upon a proper motion supported by evidence. If the opposition takes no such course, and the bill of statement shows no lapse or default, it is unnecessary to insert any reference to such order.[314]

It sometimes happens that, although the facts adduced in support of an objection to the settlement make a showing sufficient to warrant the court in refusing a settlement, yet facts exist amounting to a waiver in some way not shown upon the papers before the court. Of course, if amendments have been proposed, it is incumbent upon the opposition to show a reservation of objections; but the objection may be directed to a lapse, subsequent to the service of amendments, in which case it would be within the knowledge of the court or clerk of the court. If not within the court's knowledge, or if the judge refused to insert the facts according to his knowledge, the opposition would have to make them appear by affidavits. These would have to be met by evidence on the part of the movant, setting forth any existing facts constituting a waiver of the neglect or default. If the court then ruled that the objection had been waived and proceeded with the settlement, that would dispose of the matter in so far as it concerned the movant. But if the opposition procures the insertion of his objection, and the evidence of the facts upon which they are based, and his exceptions in the bill or statement, it behooves the movant to also see to the insertion of the evidence which he claims proves a waiver.[315] It has been seen that

314 Cole v. Wilcox, 99 Cal. 451, 549, 34 Pac. 114.

315 Beach v. Spokane R. & W. Co., 25 Mont. 367, 370, 65 Pac. 106; Higgins v. Mahoney, 50 Cal. 444; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Henry v. Merguire, 106 Cal. 142, 145, 39 Pac. 599. In the first of these cases the court said: "If the judge is willing to settle the bill or statement, he should, before certifying it, permit to be incorporated into it any objections to the settlement together with the matter in support of the objections; for example, if the defendant has served his proposed statement on the eleventh day after filing and serving notice of intention to move for a new trial, and the plaintiff, before or at the time he offers amendments, objects

where amendments are adopted, the movant has a reasonable time for the presentation for settlement, not positively fixed by law. Where the court has once held that the delay in the presentation of a statement and amendments which are accepted was unreasonable, this objection to the settlement having been properly preserved and presented when the motion was heard, the mere granting of a new trial was held not to nullify the finding that the delay was unreasonable,[316] so that if the movant, under such circumstances, when confronted with such objection, has any excuse for, or explanation of, the delay, he should see that it is put in proper form and inserted in the

or preserves his right to object, to a settlement because of delay in service or to urge the delay as a reason why a new trial should be denied, the objections should be embraced in the statement when settled."

316 Woodard v. Webster, 20 Mont. 279, 50 Pac. 791. To same effect, Estate of Kruger, 130 Cal. 621, 625, 63 Pac. 31. In the first case the court, evidently using the term "respondent" for "appellant" through inadvertence, said: "Respondent insists that under said statute no time is specified for presenting a statement with accepted amendments for settlement, and that, such being the case, a reasonable time alone is required within which this shall be done. We agree with this. But was the time within which the statement and amendments were presented to the judge, namely, fifty-seven days, a reasonable time? The lower court expressly held that it was not, and there is absolutely nothing in the record to indicate any excuse for the delay in the presentation of the statement and amendments for settlement. Under these conditions, did the trial judge have a proper statement before him when he granted a new trial? We are of the opinion that he did not. If the respondent had offered any excuse for the delay in the presentation of the statement and amendments for settlement, and the trial court had held such excuse sufficient, then this appeal would have a different phase. In the absence of such a showing in the record, it cannot be presumed that there was any excuse or justification for the delay. The lower court should have denied the motion for a new trial. Respondent urges that by its order granting a new trial the previous conclusion that the delay had been unreasonable was nullified. We cannot assent to this. Having once held that the delay was unreasonable, the objection to the settlement having been properly preserved and presented by appellant when the motion for a new trial was heard, it cannot be inferred that the lower court nullified its previous deliberate holding."

bill or statement.[317] But suppose the judge holds the objection not to have been waived and refuses to settle the statement or bill, and the movant considers this ruling erroneous? In that case would he have a remedy by appeal, would he have a remedy by mandamus, or be without remedy? The last-named condition is hardly supposable. The case would not be in line with Stonesifer v. Kilburn, because the question presented would be simply one of law and fact without involving the exercise of discretion. The writ of mandate would probably issue in such case if the facts established at the hearing on petition therefor warranted it.

In the second place, the rights and remedies of the party adverse to the party proposing the bill or statement with reference to his objections to the settlement thereof are to be considered. It was once held, under the old Practice Act, which required the proposed statement to be filed in the first instance, that if it were not filed within the time fixed by that statute or given by order of the court, that the party objecting was entitled to have it stricken from the files.[318] But that feature of the decision in that case was soon afterward overruled and condemned, even under that statute, as sanctioning a vicious practice fraught with mischievous consequences.[319] The condemnatory language was applied, however, to the striking out of statements which had been filed in good faith, and in the line of orderly procedure, on the ground that for any cause the proceeding had lapsed.

If a statement or bill should be be surreptitiously or irregularly filed, there would exist the same reasons for striking it from the files as in the case of any other paper. At any rate an order striking out a statement is appealable,[320] and will

317 Estate of Kruger, 130 Cal. 621, 625, 63 Pac. 31, holding it also to be actionable negligence for attorney to fail to have incorporated excuse for delay if existing.

318 Jenkins v. Frink, 27 Cal. 337.

319 Quivey v. Gambert, 32 Cal. 304; Calderwood v. Peyser, 42 Cal. 117.

320 Sutton v. Symonds, 100 Cal. 576, 35 Pac. 158; Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 633; Beach v. Spokane Ranch & Water Co., 21 Mont. 7, 52 Pac. 560.

be reversed, upon appeal taken in due time, probably in every case, unless it appear that it was not filed regularly, and in good faith.[321]

The striking out of the statement at the hearing and thus depriving the movant of a record upon which to appeal, instead of denying his motion for new trial, was emphatically condemned in Quivey v. Gambert,[322] where the evil consequences of so doing were shown by Chief Justice Sanderson. Notwithstanding the repeated condemnations of such orders, one was made a quarter of a century later, and the benefit of a review in the supreme court of that order, as well as of the order on the motion for a new trial, thereby lost.[323]

The supreme court of Montana has also had occasion to condemn the acts of trial courts in striking out bills and statements. In Beach v. Spokane R. & W. Co.[324] that court, per Piggott, J., said: "In the case at bar the statement on the motion for a new trial was settled, certified as allowed, and filed. It was a record of the district court of the same dignity as a bill of exceptions and performed a like office. It was the basis of the application for a new trial. It, together with such parts of the judgment-roll as were proper to be considered in determining whether a re-examination of the issues of fact ought to be had, constituted the record upon which the court below was authorized to act. Nothing else could properly be used on the hearing of the motion. The statement the court below struck out upon the ground that the draft of the proposed statement was not served in time. The court erred. If the statement was out of time as to service, proper practice required the judge to refuse a settlement, or to settle it and then deny the motion for a new trial for the reason that timely service had not been made—we do not mean to say that the order denying such motion expressly in-

321 See opinion on application for rehearing in Calderwood v. Peyser, 42 Cal. 110, 121; Lucas v. Marysville (City of), 44 Cal. 210; Beach v. Spokane R. & W. Co., 25 Mont. 367, 374, 65 Pac. 106.

322 32 Cal. 304.

323 Sutton v. Symonds, 100 Cal. 576, 35 Pac. 158.

324 25 Mont. 367, 373, 65 Pac. 106. See, also, Sweeney v. Great Falls Ry. Co., 11 Mont. 34, 27 Pac. 347.

dicates the ground upon which it is made, for every legitimate intendment will be indulged in support of the order; but to strike from the record or files the certified statement, because not served in time is always erroneous and necessarily prejudicial to the party moving for a new trial."

But the law does not, however, by any means leave the opposition remediless in case the movant has allowed the proceeding to lapse at any stage. But a degree of diligence and attention to details is required of him if he would preserve his rights and avoid a waiver of his objections. In the first place, as has been shown, he must not propose amendments to the draft served or filed without, in some appropriate form, reserving his objections founded upon any default or lapse which may have accrued up to that stage;[325] still such reservation merely preserves his objection until the settlement is reached before the judge. If the bill or statement is permitted to be settled in silence as to any objections directed at any failure to comply with the statutory requirements, either as to the time of compliance, or in other respects, except omissions which invalidate or weaken the force of the bill or statement as such, it is at every subsequent stage, just the same as if no such grounds for objecting had ever existed.

It is not necessary, as previously explained, that the statement or bill should in any way or form recite that it was served or filed or presented upon notice or in time. In Murray v. Hauser[326] the court said: "Defendant insists that the statement on motion for a new trial must be disregarded, for the reason that it was never served, and service was not waived. The record does not expressly disclose service, or waiver thereof, but the judge below has settled the statement, and certified that it is correct. Subdivision 3, section 1173, of the Code of Civil Procedure, requires the party moving for a new trial to serve a draft of the proposed statement upon the adverse party, as a prerequisite to its settlement. Settlement without such service, or a waiver thereof, would have

325 For a full discussion of respective rights and duties of parties at settlement, see chapter 19.

326 21 Mont. 120, 125, 53 Pac. 99.

been, at the least, an irregularity. In the absence of evidence to the contrary, the presumption of regularity and due performance attends official acts. When, therefore, the judge or court has allowed and settled a statement on motion for a new trial, the presumption arises that service was made, and that all steps prescribed for settlement were taken. Of course, this presumption is inconclusive, and may be rebutted by proof in the record to the contrary. No such proof appearing in this case, the presumption prevails that the statement was served in proper time, and was settled upon due notice."

Nor is it sufficient for the party opposing the settlement merely to have inserted his objection. He must have inserted in connection therewith the facts upon which he bases his objections. And the same condition arises with reference to objecting and excepting to the court's rulings as at the trial. There must be not only objection, but exception as well. In Cole v. Wilcox,[327] the opposition got into the statement a recital simply that "the defendant objected to the settlement of statement upon the ground that the same was not served in time." It also appeared (the report does not explain how) that when the motion for a new trial came on for hearing, the defendant (opposition) objected to the court hearing the same upon the ground that the statement of the case proposed for settlement by the court was not served upon him by the plaintiff (movant) within the time allowed by law, and that the court had lost jurisdiction to settle any statement in the case. The same matter was urged on appeal. The court said in answer: "If there were any reasons in support of this objection on the part of the defendant, the proper practice would have been to present them at that time so that the judge could pass upon their sufficiency, and to have the objections, with the ruling of the judge thereon and any exception thereto, incorporated into the statement. A mere objection to the settle-

327 99 Cal. 549, 542, 34 Pac. 114. See, also, Hook v. Hall. 68 Cal. 22, 8 Pac. 596; Arnold v. Sinclair, 12 Mont. 248, 261, 29 Pac. 1164; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878; Christy v. Spring Valley Water Works, 68 Cal. 73, 8 Pac. 849.

ment of the statement, without pointing out the basis or the ground of the objection, or presenting the facts upon which it was made, was not fair to either the judge or the opposite party; and even if an exception had been taken to the ruling of the judge upon such objection, the party taking the exception would not have the right to its consideration upon appeal. When the motion for a new trial came on to be heard, the court, in its action thereon, was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement, for the purpose of determining whether the new trial should be granted or refused."

What the opposition should do to fully preserve his objections, and the duty of the judge in the premises, are thus explained in a late Montana case:[328] "If the judge is willing to settle the bill or statement, he should, before certifying it, permit to be incorporated into it any objections to the settlement, together with the matter in support of the objections: for example, if the defendant has served his proposed statement on the eleventh day after filing and serving notice of intention to move for a new trial, and the plaintiff, before or at the time he offers amendments, objects, or preserves his right to object, to a settlement because of delay in service or to urge the delay as a reason why a new trial should be denied, the objections should be embraced in the statement when settled."

There appears to be no remedy for making objections well taken, but overruled by the court, effective by any original proceeding. No appeal is allowed from the judge's certificate of

328 Beach v. Spokane R. & W. Co., 25 Mont. 367, 370, 65 Pac. 106. Proper practice suggested as in text in Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893. See, also, Higgins v. Mahoney, 50 Cal. 445; Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; Connor v. Southern Cal. etc. Co. 101 Cal. 429, 35 Pac. 990; Tregambo v. Comanche etc. Co., 57 Cal. 503; Henry v. Merguire, 106 Cal. 144, 39 Pac. 599. It was held that where the record shows that the parties proposing the amendments appeared and objected to the settlement of the statement, it appears they had notice thereof, and they should then have presented all valid objections which they had to the settlement of the statement: Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113.

settlement and allowance;[329] nor would it be of any available advantage or of any value to him if provided. He has a speedy and effective remedy in hand. He merely has to await the hearing of the motion and then renew his objections as ground for denying the motion, and if the court again rules against him, then appeal from the order granting a new trial.[330] He need not await the pleasure of the movant, for either party may bring on the hearing.

§ 457. Mandate to compel settlement.

If a proposed statement does not as such entirely omit any essentials, and there has been no lapse in the proceeding, it is the duty of the court to settle it, however indifferently or informally it has been prepared; and the writ of mandate will be awarded notwithstanding the neglect of the attorney proposing it to reduce the evidence taken at the trial to proper form and dimensions.[331] In Santa Ana (City of) v. Bal-

329 Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Beach v. Spokane R. & W. Co., 25 Mont. 367, 369, 65 Pac. 106. In Henry v. Merguire, supra, the court explains why an order settling is distinguishable on the score of appealability from one settling a bill or statement (see p. 145).

330 Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; Connor v. Southern California etc. Co., 101 Cal. 429, 35 Pac. 990.

331 Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Estate of Herteman, 73 Cal. 545, 15 Pac. 121; Leach v. Pierce, 93 Cal. 627, 29 Pac. 239; Van Eman v. Superior Court, 106 Cal. 643, 40 Pac. 14. Laches is a good defense to the proceeding for mandate: McConoughey v. Torrence, 124 Cal. 330, 57 Pac. 81. Also failure to prosecute the proceeding for settlement: Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547. See Leach v. Aiken, 91 Cal. 484, 28 Pac. 777, holding that the judge before whom an action is tried cannot be compelled by a writ of mandamus to settle a bill of exceptions in the action after the expiration of his term of office, although he is authorized by statute to settle such bill; Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, holding fact that some of the parties entitled to be served were not served with draft no ground for refusal to settle the bill; Thornton v. Hoge, 84 Cal. 231, 23 Pac. 1112 holding that correctness of settled bill of exceptions cannot be tested in the mandamus proceeding; and this court will not order a reference in order that evidence may be

lard,[332] when the statement came before the judge for settlement, the opposite party objected to the settlement on the ground that it contained a literal transcription of the reporter's notes taken at the trial, but it was not objected that it had not been served or presented in time, or that the proceeding had otherwise lapsed. Thereupon the attorney for the moving party (petitioner for the writ) asked leave to amend the statement in the particular mentioned, or in any other particular in which said statement might be informal, deficient, or inaccurate, or in which it did not comply with any law or rule of practice. But the judge declined to allow him to so amend the statement by condensing from questions and answers to a narrative form, and refused to allow him to amend the statement in any respect, or at all, and refused to settle the same, and retained the same unallowed, unsettled and unsigned. These facts were set forth in the petition, which was presented upon notice for a peremptory writ. Beatty, C. J., delivering the decision awarding the writ as prayed, said: "It is the duty of the judge to settle a bill of exceptions or statement when properly presented and, if it contains redundant or useless matter, it is his duty to strike it out or order it to be stricken out, whether the parties assent thereto or not, and to make the statement truly represent the case. . . . . From the facts stated in the petition in this case, which are not controverted, the petitioner should have been allowed to amend his statement as proposed so as to avoid the objection raised, and then have said statement settled and allowed." In Sansome v. Myers[333] it was said: "It was not the duty of the judge to prepare a statement, but it was his duty to see that

taken on that issue; Visher v. Smith, 92 Cal. 60, 28 Pac. 94, holding that refusal of trial judge to settle bill is an adjudication that the bill ought not to be settled. Same case asserts apparently contrary to settled rule that any legal excuse for neglect in preparing and serving a bill of exceptions must be presented to the judge for his determination, and an erroneous ruling thereon may be corrected under a mandamus from this court.

332 126 Cal. 677, 59 Pac. 133. Winters v. Buck, 121 Cal. 279, 53 Pac. 799, was a similar case. Writ granted. See, also, Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101.

333 80 Cal. 486, 22 Pac. 212.

one was properly prepared, and then to sign it. If the attorney for the petitioner had omitted anything material, the judge should have directed and required him to insert it or if the matter was incorrectly stated, he should have required him to correct it. . . . . If the petitioner had refused or neglected to so amend the proposed statement as directed, the judge no doubt would have been justified in refusing to settle the same, but not otherwise." In that case, the judge refused to settle the statement in the first instance, and the court say: "This we think he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty." In Careaga v. Fernald,[334] the court after explaining the propriety of mandamus in such cases, said: "The statement in question, having been presented in due time, the law enjoined upon the referee the duty to settle it, and the writ of mandate will issue to compel the discharge of the duty."

Of course, the exercise of the discretion of the judge or referee as to the manner of settlement cannot be controlled or reviewed in the proceeding of mandamus. He cannot, in such proceeding, be compelled to insert or exclude any particular facts, or to settle any particular identical bill or statement presented to him, even though the same be agreed upon by the parties,[335] but to settle a bill or statement, where the matter is properly before him, if, up to that time, there has been no lapse in the proceeding.[336] It is an act which the law

[334] 66 Cal. 351, 353, 5 Pac. 615. Citing Merced M. Co. v. Fremont, 7 Cal. 130; Lin Tai v. Hewill, 56 Cal. 118; People v. Crane, 60 Cal. 279.

[335] State v. Parker, 9 Wash. 633, 38 Pac. 156. The writ will not lie to compel settlement in a particular manner, or inclusion or omission of particular matters: People ex rel. Strathern v. Sullivan, 61 Cal. 233. As to what petition should allege with reference to the contents of the bill or statement, see Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890.

[336] See Anschlag v. Superior Court, 76 Cal. 513, 18 Pac. 676, holding that a petition to the supreme court in an application for a writ of mandate to compel the settlement of a bill of exceptions in a criminal case is insufficient if it fails to show that the bill of exceptions was presented to the trial judge for settlement upon the

requires a judicial officer to perform, a duty resulting from his office.[337] And mandamus may be resorted to, although the case has been tried without the presence of an official reporter, his absence not depriving the party moving, or intending to move, for a new trial, of the right to prepare his statement or bill of exceptions from memory or such data as he may be able to avail himself of. In such case, if the motion be made upon the minutes, he has the right to rely upon the recollection of the judge as to what occurred upon the trial for the purpose of passing upon the correctness of his proposed statement or bill, and if the latter refuses to proceed with the settlement on the ground that there was no official reporter at the trial, mandamus may be resorted to to compel a settlement. In Malcomson v. Harris,[338] Beatty, C. J., delivering the decision awarding the writ of mandate, said: "It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony as matters to which references may be had on the hearing of the motion (section 660), and there is some force in the argument that such an enumeration should be regarded as exclusive; but there is much more force in the consideration that, since the judge has the undoubted right to include testimony actually given, though not reported, in a statement prepared in advance of the hearing, there is no reason why his recollection of the evidence should not be equally resorted to in making a state-

notice required by law to be given to the district attorney; Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863, holding that a petition for mandamus to compel the settlement of a bill of exceptions to an appealable order, which the trial judge has refused to settle or allow, if presented after the time for appeal from the order has expired, is demurrable if it does not allege that an appeal was taken from the order within sixty days from its date. Relief against a lapse through inadvertence must be sought in the lower court: Coffey v. Grand Council, 87 Cal, 367, 25 Pac. 547; Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50.

337 See Cal. Code Civ. Proc., §§ 1085, 1086; Leach v. Pierce, 93 Cal. 618, 29 Pac. 235; Winters v. Buck, 121 Cal. 279, 53 Pac. 799; Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Santa Ana (City of) v. Ballard, 126 Cal. 677, 59 Pac. 133; In re Application of Plume, 23 Mont. 41, 57 Pac. 408.

338 90 Cal. 262, 265, 27 Pac. 206.

ment after the hearing. The statement, at whatever time prepared, ought to be a correct presentation of so much of the testimony as is material, derived from the reporter's notes, if there are any, and if not, from the recollection of the judge, assisted by such notes as he may have taken; and the mere fact that there is no shorthand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature. We think the law demands no such construction; the enumeration in section 660 is not necessarily exclusive, and it is contrary to all considerations of justice and convenience to hold that it was intended to be. That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment. And if such evidence is to be considered, it must go into the statement."

But, from the nature of the remedy of mandamus, and the limitation upon its use—namely, that it will not lie to direct the manner of performance of a judicial act—it has been found necessary to provide another remedy for the erroneous refusal of the trial judge or referee to allow an exception which a party is entitled to have inserted in a bill or statement. Such other remedy is the subject of discussion in the next section.

§ 458. Proving exceptions before supreme court.

Section 652 of the California Code of Civil Procedure was intended to reach the necessities of cases of erroneous refusals by trial courts to allow exceptions in the settlement of bills of exceptions and statements wherein, instead of refusing to settle at all, he refuses to allow the particular exception presented by the petitioner. It reads thus: "If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, the application may be made in the mode and manner and under such regulations

as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who tried the cause." The vagueness and defectiveness of this provision are obvious. By its terms, it is limited to bills of exceptions, though held available by analogy, in cases of statements, because, as before shown, they perform substantially the same office, and are otherwise held to be governed by the same rules and principles. The terms of the section do not reach the case of the party adverse to the movant desiring to compel the allowance of an exception.[339] It does not expressly cover any other matters which it might be found necessary to insert than an exception,[340] though, since the exception (or specification) is the principal matter, other matters incidental and explanatory of it are covered by implication, as incident to, but not as principal subjects for relief. One among the first reported cases of a resort to the proceeding under the code originated upon the refusal of a trial judge to allow, not an exception proper, which it appears to have been conceded he was entitled to, but to prove and insert the facts upon which the exception and the relief desired was reserved.[341]

There appears to have been a relaxation of the above rule in Jennings v. Brown,[342] where it was held that it could not be said that the judge of the trial court had allowed an exception to a ruling admitting a certain ballot in evidence in

339 In re Gates, 90 Cal. 257, 27 Pac. 195.

340 Such appears to have been the construction placed upon the statute in Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092. See In re Gates, 90 Cal. 257, 27 Pac. 195. As to applications to supreme court in cases of inability or refusal of the trial judge to settle bills of exceptions, see Severson v. Insurance Co., 3 S. Dak. 412, 53 N. W. 860; Baird v. Glecker, 3 S. Dak. 300, 52 N. W. 1097; Taylor v. Miller, 10 N. Dak. 361, 87 N. W. 597.

341 Estate of Hill, 62 Cal. 186. See, also, Vance v. Superior Court, 87 Cal. 390, 392, 25 Pac. 500.

342 109 Cal. 290, 41 Pac. 1085, holding also, that, if in such a case it should be contended that the ballots are not in the same condition as when offered in evidence that matter can be inquired into in the supreme court.

an election contest, where he had excluded the ballot, the very thing objected to and being the sole subject of the exception.

If the petitioner allows the bill or statement to be settled without asking a postponement until application can be made to the higher court for relief, he loses the right to apply to the higher court to prove his exception.[343] But, having asked for such postponement, the judge could not probably deprive him of his remedy by consummating a settlement.

The jurisdiction being purely statutory, the petition should fully cover all the conditions to its exercise.[344] The facts showing compliance with the provisions of law preceding the settlement of the statement and a full presentation of the matter as it was presented before the trial judge must be set forth.

The materiality and relevancy of the matter which it is sought by the application to the supreme court to have incorporated in the bill or statement as well as the refusal of the trial judge to allow the same should be so fully shown as to leave nothing in doubt.[345]

[343] Frankel v. Deidesheimer, 83 Cal. 44, 23 Pac. 136. To same effect, Plano Mfg. Co. v. Person, 11 S. Dak. 539, 79 N. W. 833.

[344] See Estate of Biddel, 75 Cal. 229, 19 Pac. 181, holding that the petition should set forth the statements of the bill as settled by the judge of the trial court, which are alleged to be contrary to the facts, together with a statement of the facts and the point of the exceptions; Estate and Guardianship of Hawes, 68 Cal. 413, 9 Pac. 456; to same effect; Plano Mfg. Co. v. Person, 11 S. Dak. 539, 79 N. W. 833, holding application made after bill is settled should show objection and exception to the settlement. And before the higher court can allow an exception it must appear that it was within the power, and that it was the duty, of the lower court to allow it: Estate of Moore, 78 Cal. 242, 20 Pac. 558.

[345] See Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Nance v. Superior Court, 87 Cal. 390, 25 Pac. 500. The Practice Act of 1851, section 189, was not materially different as regards the petition from section 652 of the California Code of Civil Procedure. It was held in Warmouth v. Gardner 35 Cal. 227, that the petition must set forth at length the exceptions which were taken at the trial, and not allowed by the judge, and so much of the evidence as might be necessary to illustrate them; also, that the petition should be presented with the record. It is not thought, however, under the later decisions that the entire record need be presented in the supreme court.

The distinction, however, between the exercise of the jurisdiction under such statutes, and that in mandamus must not be overlooked. It was made clear in a Montana case,[346] where the petitioner mistook his remedy and proceeded under the code provision for proving exceptions, instead of applying for a writ of mandate. The allegations of the petition showed simply a refusal to settle any statement whatever. In refusing the relief prayed, the court said: "Neither section 1157 nor the rule of this court above referred to is applicable to this proceeding, for the section and the rule have in contemplation those instances only where the judge, while willing to settle a statement or bill, refuses to allow an exception in accordance with what the party aggrieved claims are the facts. Neither has reference to the action of the judge refusing to settle any bill or statement whatever upon the ground of unreasonable delay in seeking settlement. The petitioner has mistaken his remedy. If the judge or court below abused his or its discretion in making the order by which a settlement was refused, mandamus will lie; or, if the order was made after final judgment, the tedious remedy by appeal from that order might, perhaps, be resorted to. It is well established, at least, that mandamus, being speedy as well as plain and adequate, is an efficient remedy in such case." Lewis v. Hyams[347] was the first instance found in which the supreme court of that state was called upon to act upon such a petition. In that case the statement on motion for a new trial had been settled and certified to by the judge of the lower court, and at the request of the petitioner, and upon an order from the supreme court, the hearing of his motion for a new trial was continued by the lower court pending a decision upon his petition to prove exceptions. Objection was made that the petition was not presented in time, but was not passed upon, the petition being dismissed because the petitioner produced affidavits at the hearing to prove the allegations of his petition, whereas, but for his neglect, he might have preserved and produced record evidence.

Section 3213 of the General Statutes of Nevada, which is

346 In re Plume, 23 Mont. 41, 57 Pac. 408. See, also, Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174.

347 25 Nev. 242, 59 Pac. 376.

section 191 of the Practice Act of 1851, as amended in the statutes of California of 1863, at page 360, is very similar to section 652 of the present Code of Civil Procedure of the state of California. Both sections 189 of the California Practice Act and section 652 of the California Code of Civil Procedure have been passed upon on several occasions by the supreme court of that state, and the decisions upon the subject are all to the effect that a petition for leave to prove exceptions may be presented at any time before the submission of the motion for a new trial, and some of them are even to the effect that such petition may be filed after the hearing of the appeal. And those decisions are also uniform in holding that not only the exceptions themselves may be proven, but so much of the facts and circumstances surrounding the taking of such exceptions as may be necessary to explain them may also be proven.

No other decisions of any authoritative consequence under such or under a similar statute has been found than those above mentioned and those rendered under said code provision in California. Before attempting to deduce from numerous decisions in the last-named state any general rules for the guidance of practitioners, it is proper to call attention to, without entering into a discussion of, the constitutional question raised but not decided in one case, where the court said: "It may be noticed that counsel for respondent raises here, for the first time, the point that section 652 is unconstitutional, for the reason that by it the legislature undertook to confer upon this court powers, and to impose upon it duties, not embraced in any of the categories of jurisdiction enumerated in that part of the constitution by which this court is created. But, as the case is already disposed of, we do not care to consider the constitutional question at this time." [348]

Without reference to the disposition which the court may ultimately make of the constitutional question, a tendency to give the code provision a strict construction and to limit its operation within the express language employed is clearly shown. On several occasions, the court has refused to attempt that which even savored of the exercise of the jurisdic-

[348] Vance v. Superior Court, 87 Cal. 390, 393, 25 Pac. 500.

tion of the lower court, or, more correctly speaking, of performing the function belonging to it of settling and allowing bills and statements where such exercise of power was sought in the form of a petition under said section. In Landers v. Landers,[349] McFarland, J., delivering the opinion, said: "Section 652 was not intended to apply, and does not apply to the case where a trial judge has refused to settle a statement or bill of exceptions. . . . . The theory of the petition seems to be that this court, with a few general averments before it about the conduct in the premises of the judge of the trial court, will put itself generally in the place of that court, and proceed to construct for it an original and complete bill of exceptions. Such is not the meaning of the code." The effect of what was said in the subsequent case of Hyde v. Boyle,[350] while assuming to reiterate merely the doctrine of Landers v. Landers, was to go a step further in limiting the jurisdiction. While the court in the earlier case declared that it would not "put itself generally in the place of that court, and proceed to construct for it an original and complete bill of exceptions," it said in the subsequent case that the provision did not "give this court jurisdiction to remodel a bill of exceptions generally by striking matter out of it," etc. In Vance v. Superior Court,[351] the subject of the scope of the jurisdiction received more attention than in any previous decision, the opinion being written by the same justice, and was made as clear as the nature of the subject permits. From the decision the proposition is deducible that the purpose of the proceeding must be to establish one or more exceptions—that is, that exceptions were actually taken which the lower court denies were taken. That, and not the insertion of evidence disconnected with the exception which it is sought to establish, must be the main purpose; but, that being accomplished, the party may also prove, "in that connection, sufficient surrounding facts to show what the point of the exception is." In Cox v. Delmas,[352] the court was petitioned by the defendant on the

349 82 Cal. 480, 23 Pac. 126.

350 86 Cal. 352, 24 Pac. 1059.

351 87 Cal. 390, 25 Pac. 500.

352 92 Cal. 652, 28 Pac. 687.

ground that the lower court had allowed amendments to a proposed statement which contained evidence which had not been, in fact, introduced at the trial. In denying the petition, the court said, in substance, that the assumption that the court was empowered by the code provision to revise the proceedings of the superior court in the settlement of statements, and in so doing, to examine witnesses and decide as to what matters of evidence included in a statement as settled were in point of fact erroneously included therein, was unfounded. In view of these decisions, it is not at all remarkable that applications to the supreme court have become much less frequent than formerly. The issues of fact which the higher court will try are exceedingly narrow—namely, whether one or more specified decisions were rendered upon matters presented to the lower court; if so, upon what matters, and did the party against whom they were rendered except.

But even upon a case within the court's jurisdiction being presented, upon a proper petition, the petitioner is only at the threshold of his difficulties, if his facts be not admitted. In the first place, the application would perhaps be treated as premature prior to the authentication and filing of the bill or statement, because, until that stage, it cannot be said with any degree of certainty either that his exception will not be finally inserted, or that other changes and insertions will not be made which will avoid any injury resulting from the omission complained of. By what evidence he must overcome the presumption of correctness attaching to the settled statement is shown in the opinion in the case of Vance v. Superior Court above mentioned, where, after a general discussion of the subject, it was said: "If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character and under the judicial oath, cannot be overcome by the contradictory testimony of somebody else, why, it must be put into the large class of evils (real or imaginary) which this court has no jurisdiction to remedy." This was not said as a declaration bearing upon the admissibility or weight of evidence, but as one of the reasons for not extending the jurisdiction beyond the narrow limitations of the statute; nevertheless, it indicates that, in case of conflict between the allegations in the petition and the re-

citals in the bill or statement, it would have to be very clearly shown by the most convincing proof that the facts were different from those recited in the latter. But even where such conflict does not exist, yet, if the allegations of the petition are denied by the answer and there is, at the hearing, a direct conflict in the evidence, the relief will be refused.[353]

The petition must be presented before submission of the appeal, where a bill of exceptions on appeal from the judgment is involved and obviously, and from the necessities of the case, it should, where a bill or statement on motion for new trial is involved, be presented before the motion is submitted in the lower court.[354]

§ 459. Effect of statutory changes.

It has been found necessary in several previous chapters to refer to the effect, as well as to the time of the taking effect, of amendments to statutes governing procedure, upon pending proceedings for new trial. The general proposition previously stated that an act already performed, or a step already taken prior to the taking effect of a statute or amendment changing the procedure is valid as done or taken, notwithstanding the change; but acts and steps to be done and taken subsequently must conform thereto. Thus, it was held that the act of 1863, amending the one hundred and ninety-fifth section of the Practice Act of 1851, was the law governing the preparation of statements on motion for new trial after its passage.[355] In that case, the amendment consisted in part of a requirement that specifications of errors should be inserted in statements. The plaintiff contended that the proceeding for new trial having been instituted before the amendment became operative, and the statement which omitted the specifications being sufficient under the section as it stood at that time was

353 People v. Scott, 121 Cal. 101, 53 Pac. 364. See, also, Matter of Howard, 108 Cal. 31, 40 Pac. 1043; Crow v. Minor, 85 Cal. 214, 24 Pac. 640.

354 See Walmouth v. Gardner, 35 Cal. 227, 229.

355 Partridge v. San Francisco (City and County of), 27 Cal. 415. To same effect, Kelly v. Larkin, 47 Cal. 58; Taylor v. Holter, 2 Mont. 477.

to be tested thereby as to its sufficiency, although prepared after the taking effect of the amendment. The court held, however, that the amended section was the law governing the preparation of the statement, and that it became the duty of the lower court to disregard the same on account of its failure to comply therewith.

On the same principle, where a motion had been heard and decided before the Code of Civil Procedure took effect, it was held to be governed on appeal by the law as it then stood, although appealed after the code became operative.[356]

§ 460. Incorporation of affidavits and exhibits in bills of exceptions.

The supreme court, after encountering great difficulty in dealing with the question of identification of affidavits relied upon on appeal, at length adopted rule 29, requiring that, on all appeals from orders, the papers and evidence used or taken on the hearing should be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication was provided by law. It was subsequently held that no other mode was provided by law.[357] In so far as can be learned from reports of cases, the rule has been of late strictly enforced.[358]

Since the adoption of the rule, it appears not to have been decided whether it is necessary that the affidavits actually appear in the body of the bill or statement. It was held, prior to the adoption of the rule, sufficient that they were annexed to the bill and fully identified by reference.[359] The decision

[356] Hancock v. Thorn, 46 Cal. 643.

[357] Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491.

[358] See Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Pereira v. City Sav. Bank, 128 Cal. 45, 60 Pac. 524. Same rule enforced elsewhere: See, Cleghorn v. Sayre, 22 Colo. 400, 45 Pac. 372; Daum v. Conley, 27 Colo. 56, 59 Pac. 753; Nosler v. Coos Bay etc. Nav. Co., 40 Or. 305, 63 Pac. 1050, 64 Pac. 855; Norfor v. Busby, 19 Wash. 450, 53 Pac. 715; Heffner v. Board of Commrs. of Snohomish County, 16 Wash. 273, 47 Pac. 430.

[359] Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131. In this case the affidavits were referred to in the statement by number and words; in the appendix where they appeared, they were preceded by

has not been overruled or criticised. But, according to subsequent decisions, the identification and description in the bill would have to be very full and complete. It would be safer, and just as easy to insert them in the body of the bill or statement. And since a contrary ruling would go far to abrogate the true purpose of the rule—namely, the prevention of fraud and fabrication—the court would probably not sanction any such deviation as above mentioned.

In discussing the various grounds for new trial, which statutes and code provisions direct shall be presented on affidavits, it was thought best, in order to insure completeness of consideration, to examine and present the law bearing upon the essentials of such affidavits. This was thought a more convenient method than that of devoting a separate chapter to their consideration, which would involve constant and numerous references to the chapters and sections devoted to a discussion of these particular grounds for the motion.

§ 461. Connected use of affidavits, statements, bills of exceptions and other files and records.

The code provides in section 658 that: "When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause, it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions or a statement of the case, prepared as hereinafter provided." Since irregularities to be urged are often susceptible of easy proof without a resort to affidavits from the fact that they have become in some form a part of the record, it evidently was the intention of the legislature that the affidavits here required should be directed, not so much to proving the facts constituting "irregularity in the proceedings of the court, jury, or adverse party" as to giving point and effect to the episode or act complained of, by showing that by it he "was prevented from having a fair trial,"

the words: "The following are the exhibits offered and read in evidence on behalf of the plaintiff, and mentioned in the foregoing statement"—they are thereby sufficiently identified and incorporated in and made a part of such statement.

or what is but another form of expressing the same thing, that it materially affected his substantial right. Of course, there may be and sometimes are irregularities which prevent a fair trial, the evidence to prove which is shrouded in secrecy, such, for instance, as tampering with witnesses and jurors, but in many other cases, the facts constituting the irregularity itself are proven by the files, minutes or reporter's notes, and the main effort of counsel must be directed to proving the effect upon the result of the act or proceeding objected to. And not only with reference to irregularities averred by the first subdivision, but either, or all, the grounds covered by the other subdivisions as to which the party is apparently confined to affidavits at the hearing, he may undoubtedly resort freely to any statement or bill of exceptions settled and allowed for use under any or all the three subdivisions as to which they are required, and to other records and files.

But the use of affidavits at the hearing of the motion as well as their admissibility and effect are more proper subjects for discussion elsewhere.[360]

360 See ante, §§ 406-411.

PART III.

APPELLATE PRACTICE.

CHAPTER 23.

JURISDICTION.

§ 462. Jurisdiction of supreme court conferred and limited by the constitution—Judicial, an independent department of government.

§ 463. Legislature cannot enlarge jurisdiction of courts, but may prescribe regulations.

§ 464. Necessity for definite legislative scheme, supplementing the constitution.

§ 465. Powers of supreme court as to method of procedure, in absence of legislation.

§ 466. The statutory scheme for exercise of appellate jurisdiction exclusive.

§ 467. Heads of appellate jurisdiction—Cases at law—Limitation with reference to amount involved.

§ 468. Heads of appellate jurisdiction—Cases of equitable cognizance.

§ 469. Same—Cases of equitable cognizance in justice's court.

§ 470. Heads of appellate jurisdiction—Divorce cases.

§ 471. Heads of appellate jurisdiction—Cases involving title to, or possession of, real estate.

§ 472. Heads of appellate jurisdiction—Cases involving legality of tax, impost, assessment, municipal fine.

§ 473. Heads of appellate jurisdiction—Cases of forcible entry and detainer.

§ 474. Heads of appellate jurisdiction—Actions to abate nuisances.

§ 475. Jurisdiction in action of claim and delivery—How value tested.

§ 476. Heads of appellate jurisdiction—Probate matters.

§ 477. Heads of appellate jurisdiction—Special cases.

§ 478. Heads of appellate jurisdiction—Criminal cases.

§ 462. Jurisdiction of supreme court, conferred and limited by the constitution—Judicial, an independent department of government.

Under constitutional systems of government, courts derive their being from the people, speaking through a constitution. Not only are courts thus created, but the powers exercised by them are so conferred. But constitutions seldom directly prescribe the partition of jurisdiction between the various courts in detail. This is done through the agency of legislatures authorized so to do in the same organic law. The jurisdiction, or judicial functions, vested in the courts are not derivable from legislative enactment, but from the same authority which creates the legislative department of government, it being a fundamental principle of all republican, or representative, government that only legislative power can be exercised by the legislature, and only judicial power by the judicial department.[1] This question arose in California soon after the adoption of the first constitution, the fourth section of the sixth article of which, after defining the appellate jurisdiction of the supreme court, empowered it "to issue writs of habeas corpus" and all other writs and process necessary to the exercise of their appellate jurisdiction. It was contended by counsel that, in addition to appellate, the supreme court might exercise other jurisdiction, and might issue original writs of quo warranto. But the court disposed of the question by saying:[2] "The counsel holds that this section does not exclude from this court the exercise of other than appellate jurisdiction, and in support of this construction, refers to similar clauses in the constitutions of several of the states to which is appended the word 'only' or other words of negative import. It is difficult to perceive how the presence of this word could, in any manner, substantially affect the jurisdiction of this court. It is said by the counsel that this court was created the highest judicial tribunal of the state by the people, and that it holds the same relation to the people of the state as the court of king's bench to the king of England at the time of the organization

1 Bryce Am. Com. 429; King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754.

2 People ex rel. Attorney General, Ex parte, 1 Cal. 85, 88.

of that court. Whatever may be the practice of the king's bench as to writs of this nature, it is clear that the power which created this court has declared what its jurisdiction is. That power did not confer upon this court all the prerogatives and undefined power of the court of king's bench when the common law should be adopted, and which would have been inferred if its jurisdiction had not been defined. If the declaration of this jurisdiction be not exclusive of all other, why, it may be asked, define it? Without the use of the words, the court would possess 'appellate jurisdiction.' And if, as is contended, the court can exercise all other jurisdiction than that of the kind specified, then it may entertain appeals in any case when the matter in dispute is less than the sum of two hundred dollars, and thus it must follow (to give the language in the constitution meaning), that we are forced to the inference that all other jurisdiction than that of an appellate court, and all matters incidental thereto, are excluded. The only original jurisdiction conferred either by the act of the legislature or the constitution, is in the isolated case of issuing writs of habeas corpus. If it had been intended, either by the framers of the constitution or the legislature to bring under the cognizance of this court any other matters of original jurisdiction, it is but reasonable to suppose that this process alone would not have been designated." Following this decision were various attempts by the legislature to extend the jurisdiction of the courts to subjects and cases not within the scope and meaning of the constitution. One such attempt was considered in Caulfield v. Hudson,[3] passing upon the validity of an act attempting to confer upon district courts jurisdiction of appeals from county courts, and holding it unconstitutional. In reaching its conclusion, the court said: "It seems that, in this subdivision of power among the different arms of the judiciary, there was an attempt at great care and accuracy in assigning to each a well-defined portion of judicial duty. In doing this, there must have been some specific object or leading motive, and no other appears so reasonable, as that it was intended to limit, as well as confer jurisdiction, in order the better to secure the independence of this department of

[3] 3 Cal. 389.

the government. For if, as is contended by the respondent, there is no prohibition to an increase of the jurisdiction by the legislature, it may be at once conceived how readily the functions conferred by the constitution on the supreme or district courts may be impaired or subverted, by imposing on those courts a succession of new duties, which would force them into a sphere of action inconsistent with that already fixed by the fundamental law. If the legislature can force appellate jurisdiction on the district, they can equally give original jurisdiction to the supreme court, and then, by a system of rules which they have unquestioned right to make, compelling the courts to give preference in hearing to certain causes, or to a particular calendar, the constitutional functions of the courts would exist only in name; for all practical purposes they would be effectually destroyed." The principle of that case was approved and followed in subsequent cases under the constitution of 1849 before its amendment.[4]

One result of these and subsequent decisions, and of many similar decisions in other states is that definitions of jurisdiction in constitutions are limitations upon jurisdiction. To permit the legislature to extend, or subtract from, the jurisdiction would be to sanction an amendment of the constitution by the legislature; but constitutions invariably withhold such dangerous power from its mere creatures and preserve it in the hands of the people who create both constitutions and departments of government.

And in perfect harmony with the rule that the legislature cannot increase the jurisdiction of the courts is the rule that it cannot diminish it.[5] Nor can the same result be accomplished indirectly, as by the creation of a new tribunal, and be-

4 Reed v. McCormick, 4 Cal. 342; Townsend v. Brooks, 5 Cal. 52; People v. Fowler, 9 Cal. 86. See, also, Will of Bowen, 34 Cal. 688, holding that the legislature could not confer upon the district courts jurisdiction to try issues of fact joined in the probate court.

5 Adams v. Town, 3 Cal. 247; Fitzgerald v. Urton, 4 Cal. 236; Adams v. Woods, 8 Cal. 314; Willis v. Farley, 24 Cal. 499; In the Matter of the Senate, 9 Cal. 623; Ex parte Thistleton, 52 Cal. 220.

stowing upon it some of the powers of a pre-existing court, constitutionally created.[6]

Speaking broadly, and according to uniform authority in all the states, where a state constitution defines jurisdiction of a

[6] Spencer Creek Water Co. v. Vallejo, 48 Cal. 71, 73. The act considered in this case provided that "the mode of proceeding to appropriate and take possession of such land and waters when the parties cannot agree upon a purchase thereof shall be the same as prescribed in sections 27, 28 and 29 of an act for the incorporation of railroad companies, passed April 22, 1853, except that such proceedings shall be had before the county judge of the county in which such lands, or waters, or both, are situated." The court, in passing upon a case brought before it under this statute and denying the jurisdiction thus sought to be conferred, said: 'Section 8, article 6 of the constitution confers upon the county courts original jurisdiction 'of all such special cases and proceedings as are not otherwise provided for.' The proceedings provided for in the statute of 1858 are to be classed as special cases. Jurisdiction of such special cases pertains to the county courts, unless the statute confers it upon some other proper tribunal. The county courts are the residuary donees of such jurisdiction. The legislature may grant jurisdiction to those courts, as well as to the district courts; and in view of the decision in the Appeal of Houghton, 42 Cal. 35, in which it was held that the court had no appellate jurisdiction of the proceedings sought to be reviewed, because the statute had declared that the judgment of the county court should be final—in other words, because no appeal had been provided—it would seem to be the necessary conclusion that jurisdiction of special cases can be exercised only by those courts to which it is granted by the statute and the county courts, when not otherwise provided for. The question, therefore, arises whether, under the constitution, the legislature has competent power to create a tribunal and confer upon it jurisdiction in special cases; for it is beyond question that the county judge is not the county court, and although the legislature may authorize the judges of the several courts to perform certain duties, at chambers, in respect to proceedings in a cause, yet some court has jurisdiction of the cause, and the judge, in chambers, whether of the same or another court, acts as a commissioner, or in some other capacity, merely in aid of and subordinate to the court having jurisdiction of the cause. It being, we think, beyond dispute, that a county judge is not the county court. If jurisdiction of special cases could be conferred upon the county judge, it is equally competent to the legislature to confer it upon the county clerk, recorder or sheriff, or to create a new tribunal for the exercise of such jurisdiction."

court, the legislature cannot change the boundaries or extent of that jurisdiction.[7]

§ 463. Legislature cannot enlarge jurisdiction of courts, but may prescribe regulations.

Under a representative government, it is as essential that duties and responsibilities should not be shifted from one department to another as that those of one should not be invaded and absorbed by another; therefore, the legislature cannot impose any other than judicial duties upon the courts.[8] Matters

7 Spencer Creek Water Co. v. Vallejo, 48 Cal. 71; Hutkoff v. Demorest, 103 N. Y. 377, 8 N. E. 899, 10 N. E. 535; State v. Ganneway, 16 Lea (Tenn.), 124; Harris v. Vandeveer, 21 N. J. Eq. 424; In Matter of Application of Senate, 10 Minn. 78.

8 Burgoyne v. Supervisors, 5 Cal. 9; People v. Nevada Co., 6 Cal. 143; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; Hayburn's Case, 2 Dall. 409n; Reese v. City, 19 Wall. 107; Ex parte Griffiths, 118 Ind. 83, 10 Am. St. Rep. 107, 20 N. E. 513; McLean Co. v. Deposit Bank, 81 Ky. 254; State ex rel. v. Archibald, 5 N. Dak. 359, 66 N. W. 234; Everitt v. Board of Commrs. of Hughes Co., 1 S. Dak. 365, 47 N. W. 296. In Smith v. Strother, supra, the court had under consideration an act amendatory to a section of the Code of Civil Procedure attempting to impose upon the court the duty of fixing the salaries of court reporters. The terms of the act, as well as the views of the court, are fully shown in the opinion, which is in part as follows: "The language of the act on which the question for decision depends is as follows: 'The official reporter shall receive, as compensation for his services, a monthly salary to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county, in the same manner and at the same time as the salaries of county officers.' It is urged that this act provides a mode of fixing a salary of an officer which is violative of the constitution, in this: that the fixing of the salary in the mode provided would be the exercise of a legislative power. Now, what is the judge empowered by the words above quoted to do? As we understand it, it is to fix a salary in advance of service by the officer, not exceeding a certain sum per month, to be paid monthly, the salary so fixed to continue until the court shall make an order changing it, and be paid every month during its continuance, though in consequence of a vacation of the court no service is rendered. The power is not to determine the value of services already rendered during the month, and to fix the amount of every monthly payment as compensation for services rendered with reference to the value so

made legislative by the constitution cannot be interfered with

determined, not exceeding the limits prescribed by the act. It is prescribed by the first section of article 3 of the constitution of this state that 'the powers of the government of the state of California shall be divided into three separate departments, the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted.' Is the performance of the act devolved by the section of the statute above quoted on the judge of the superior court, by such judge, a legislative or judicial act? Such is the point presented for our determination. What constitutes the distinction between a legislative and judicial act? The former establishes a rule regulating and governing in matters or transactions occurring after its passage. The other determines rights or obligations of any kind, whether in regard of persons or property concerning matters or transactions which already exist and have transpired ere the judicial power is invoked to pass on them." After citing and commenting upon authorities, the court proceeded: "Tested by the foregoing, we are of opinion that the fixing of the salary of a reporter by the judge in advance of services rendered, to be paid to him monthly, such salary to continue until changed by the order of the judge, and to be paid where, as in the recess of the court, no services are rendered, would be an exercise of legislative power. In doing this, the judge would be determining no right or obligation pertaining to person or property on facts already existing, but would be laying down a rule to be applied to a case, the facts of which must afterward transpire. As this would be an exercise of legislative power not expressly directed or permitted by the constitution to a court or judicial officer, the act must be declared unconstitutional." In Merrill v. Sherburne, 1 N. H. 404, Justice Woodbury said that "the former [judicial tribunals] decide upon the legality of claims and conduct, and the latter [legislative tribunals] make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one and made by the other." An exceptionally accurate distinction between a legislative and a judicial act was given by Justice Field in the Sinking Fund Cases, 99 U. S. 761, as follows: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other provides what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is to that extent a judicial one, and not the proper exercise of

by the courts; nor is it within the power of the legislature to authorize such interference.[9]

Many matters of detail, however, are of necessity delegated to the legislature, in state constitutions. The laws enacted in pursuance of such delegated power are distinguished as regulations of jurisdiction. In a general sense, all practice acts and codes of procedure are such; but in a more restricted sense, the term "regulation" would be applicable to statutes providing how jurisdiction may be acquired of the person, and how and upon what conditions a cause may be transferred from a trial, to an appellate, court.[10] It is clear, however, that, under the guise of regulation, the legislature cannot deprive any court of any of its jurisdiction, constitutionally derived. Among those powers is that of prescribing the forms and methods by which matters within the court's jurisdiction shall be presented to it. Accordingly, it was held, under constitutional provisions similar to those found in California, that an act, attempting to regulate the physical form of the pleadings and instruments, to be filed with the supreme court, namely, that transcripts on appeal might be printed or typewritten at the election of the appellant, contrary to a rule of court, was invalid.[11]

legislative functions." See, also, Lane v. Doe, 3 Scam. 238, 36 Am. Dec. 543; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Ex parte Shrader, 33 Cal. 279.

9 Smith v. Myers, 109 Ind. 1, 58 Am. Rep. 375, 9 N. E. 692; Robertson v. State, 109 Ind. 79, 10 N. E. 582, 643; State v. Harmon, 31 Ohio St. 250. Without an express constitutional provision requiring it, a court is not bound to give opinions to the legislature: Opinion of Justices (Ind.), 21 N. E. 439; Opinion of Justices, 49 Mo. 216; In re Irrigation Resolution, 9 Colo. 620, 21 Pac. 470.

10 See Canada del Oro Mines v. Collins (Ariz.), 36 Pac. 33, disapproving History Co. v. Dougherty (Ariz.), 29 Pac. 649.

11 Jordan v. Andrus, 26 Mont. 37, 91 Am. St. Rep. 396, 66 Pac. 502; Michener v. Fransham, 26 Mont. 44, 66 Pac. 1087; Supreme Court Rules VI and IX. Passing upon said act the court in the first case above cited, per Justice Milburn, said: "What is meant by 'limitations' and 'regulations'? The words in their ordinary sense are easily understood to mean what they in legal parlance, respectively, imply, to wit, restrictions of power and rules of conduct or proceeding. The matter of this rule need not be treated as in any wise

§ 464. Necessity for definite legislative scheme supplementing the constitution.

There must be some constatory machinery, or scheme provided by statute or established by the court itself for the ex-

affected by the power of the legislature to establish limitations to jurisdiction. Its power to make rules of conduct or proceeding (that is, rules of procedure and practice) is all that can be considered on this motion. The question is, Has the legislature the authority under the constitution, after having enacted a Code of Civil Procedure, including a chapter establishing the procedure and practice in the matter of appeals to the supreme court, to dictate to the supreme court as to the very physical substance of the pleadings and other instruments which it may be necessary for the justices to handle, read and study in their deliberations after the cause is submitted. . . . . It is doubtless true that the legislature has power by 'regulations' to establish the procedure in civil and criminal cases (that is, the steps to be taken by the parties in an action or other legal proceeding before this court), so far as such procedure does not amount to a denial of justice, and has power to declare by law what shall be the practice on appeal (that is to say, to fix the form, manner and order of conducting and carrying on causes through their various stages according to the principles of law); but we cannot see how the power to make regulations (that is, to establish procedure and practice) includes the power to interfere with the discretion of this court in saying that the instruments, filed for the reading of the justices of the court shall be printed and upon certain sized paper, to the end that causes may be conveniently heard and disposed of, and not delayed by the necessity of handling and reading papers which are inconvenient in shape and condition. To admit power in the legislature to annul the rule referred to, and to permit the appellant, at his option, to compel the justices, desirous to learn the facts and to consider the points of counsel, to labor through a mass of carbon copies of typewritten matter, is as unwarranted as to admit that the legislature has power to authorize counsel, without the consent of court, to submit their causes without argument, oral or printed. To require transcripts to be printed is to regulate the matter of hearing and considering, and does not interfere with any right of the appellant to take and perfect his appeal, or to take or to omit any step in procedure, or to alter the practice; that is, the form, manner or order of conducting his appeal. The rule is only a declaration on the part of the court that, in doing its share of the labor in connection with the appeal, it must have the papers of such material substance, style and size that the justices may not have their labors increased beyond what they should be.'' Same principle declared in Petition of Leach, 134 Ind. 665, 34 N. E. 641; In re Application of Day, 181 Ill. 73, 54 N. E. 646.

ercise of jurisdiction, without which it cannot be exercised. Thus, it was held that a constitutional provision that "the supreme court shall have appellate jurisdiction in all cases and proceedings," with certain exceptions, was not self-executing, and that an appeal could not be entertained in the absence of a prescribed method of appeal, designated by the legislature or the rules of the supreme court.[12]

It follows that, though a case fall within the appellate jurisdiction of the supreme court, yet, if neither any statute has provided for an appeal nor the supreme court has provided any method by which it may be reviewed, that court cannot review it otherwise than by writ of error, or other original method sanctioned by the constitution or by the court in the exercise of its authority under the constitution. The foregoing propositions were established in the early history of the court. The proposition that, in the absence of a statutory appeal and of any rule or regulation, the supreme court's appellate jurisdiction could not be exercised was advanced in Warner v. Hall,[13] where an application for a writ of certiorari to a county court was denied. The same question arose soon afterward in White v. Lighthall.[14] The court, in denying the application, said: "The supreme court is strictly an appellate court, hav-

12 Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158. In this case the court said: "It is urged by the respondent that the appeal in this case cannot be entertained, for the reason that the statutory provision for an appeal in condemnation proceedings is limited to an appeal from the amount of damages. We think this view of the law is correct. The right of appeal in the absence of constitutional provision, which we will hereafter discuss, is purely statutory; and while the courts always have sought, and probably ought to seek, to sustain the right of appeal, rather than to refuse it, it must be ascertained from the statute if such right is bestowed. . . . . It is our opinion that, at least in the absence of a prescribed method of appeal, designated either by the legislature or by the rules of this court, an appeal cannot be entertained. The wisdom or unwisdom of not providing for an appeal in cases of this character is a matter which is submitted to the discretion of the legislature."

13 1 Cal. 90.

14 1 Cal. 347. See, also, People ex rel. v. Turner, 1 Cal. 143, 52 Am. Dec. 295, and note.

ing no original jurisdiction. Its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. The legislature has conferred upon us no power to review judgments of the county court, on appeal, or in any other way. It is true that we may issue writs of certiorari, but only to courts from whose judgments an appeal may be taken. The county court is not one of these. The legislature has not provided any practice, by which a judgment of the county court may be reviewed by us. The constitution is sufficiently broad to authorize the legislature to make provisions for such a case, but they have not prescribed the quo modo in which an appeal may be taken, and we have no power to enact laws."

But the court appears to have subsequently given a more liberal construction to the constitutional provision conferring jurisdiction upon it than these decisions indicate. The above expression in White v. Lighthall goes the length of depriving the supreme court of the exercise of any jurisdiction whatever by means of such original writs as error, certiorari and prohibition, unless there had been previously provided, either by statute or court rules, some scheme or machinery for its exercise. The court did not then, as it did subsequently, look upon these original writs as ready-made methods, to be resorted to, in proper cases, for the purpose of setting in motion its appellate jurisdiction.

The able concurring opinion of Justice Wallace in Appeal of Houghton,[15] while going no further than to assert the power of the court to exercise its jurisdiction by these writs under established rules, yet is an advance from the earlier view. It is, in part, as follows: "Independently of rules adopted by this court on the subject (and there are none), an appeal, as a mere procedure, is defined by statute; it is essentially the creature of the statute, and may be accorded or withheld, restrained, enlarged or wholly abrogated by legislative enactment. It cannot be affirmed to have any existence, except as found in the expression of the legislative will. The constitution has not undertaken to define it, or to secure its benefits,

[15] 42 Cal. 35.

to any person, as against the legislative control. While that instrument has defined the cases to which the appellate jurisdiction of this court extends, it has not attempted to provide, in any wise, for the mere instrumentalities through which that jurisdiction is to be exercised. It has left that subject wholly at large, and to be provided by the legislature, through statutes enacted, or, in default of them, by this court, through rules adopted for that purpose. The jurisdiction of this court, as defined by the constitution, it is true, is in no sense dependent upon legislative provisions for its appropriate exercise. It exists, and is capable of effective assertion, independently of legislative aid as to the procedure through which it is to be exerted. In general, but not always, the proceedings by which causes reached this court have pursued the provisions in that respect prescribed by the statute of the state; for, in general, but not always, these provisions have been found to be sufficient for the due exercise of the appellate power of the court over the subject committed to it by the constitution. In the year 1854, however, the legislature, having failed to provide any means by which judgments rendered upon applications made for writs of habeas corpus might be reviewed here, and the means provided by legislation for the review of certain judgments rendered in the county courts having failed of their purpose, this court, nevertheless, exercised its appellate power over such judgments, through the instrumentality of appeals and writs of error prescribed and regulated under its own rules, and by its own authority." The court had previously adopted rules governing appeals and writs of error.

Appeals have been so liberally provided for, extending to almost every subject requiring review, that a resort to writs of error and certiorari has seldom been found necessary; so that practically, the question of whether a right of appeal exists in any case is simply a question of whether one has been provided by statute.

§ 465. Powers of supreme court as to method of procedure in absence of legislation.

It may now be considered as settled, in California, that where the supreme court has been given, by the constitution,

appellate jurisdiction in a particular class of cases, but the legislature has prescribed no means for taking an appeal, the appellate court has inherent power to establish any appropriate system of procedure, and. for such purpose, may adopt rules, issue writs of mandamus and certiorari, or frame and issue any suitable writ, or adopt any mode of procedure already prescribed or resorted to by the parties for bringing a cause before it.[16]

[16] People v. Jordan, 65 Cal. 644, 4 Pac. 683. In this case Justice McKinstry, delivering the opinion, said: "The legislature has prescribed no procedure for an appeal to this court in criminal actions, except 'in criminal actions amounting to felonies' : Pen. Code, § 1235. But the supreme court has appellate jurisdiction 'in all criminal cases prosecuted by indictment or information,' etc.: Const., art. 6, § 4. The same section of the constitution provides: 'The court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.' The power to issue the writs specified, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist had the constitution been silent on the subject. It may be conceded for our present purposes that where machinery has been supplied for the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it, a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise. In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this state to establish an entire Code of Procedure in civil cases, and an entire system of procedure in criminal cases, except that criminal actions of a certain class must be prosecuted by indictment or information: Const., art. 1, § 8. . . . . Doubtless when a practice with respect to any procedure as to which the statutes are silent has been once adopted by this court, the protection of practitioners would demand that no change should be made, except by rule, duly published. But the authority of any usage is derived from its recognition and sanction by the court, and we cannot decline to take cognizance of a matter clearly within our jurisdiction because the mode of procedure applicable to it has not been regulated by statute, written rule or precedent. In such case it is our duty to create a precedent. When this is done we do not recognize an exist-

§ 466. The statutory scheme for exercise of appellate jurisdiction exclusive.

The constitution of California, as has been previously stated, merely confers appellate jurisdiction upon the supreme court, referring all matters of method and procedure to the legislature. The latter department of the government had the power to prescribe whatever mode of exercising the jurisdiction it saw fit, or it might have refrained from providing any whatever. In the latter case, the supreme court, its members having been duly elected and qualified, under general laws, and having duly organized as a court, might have formulated a complete scheme of appellate practice and procedure suitable for putting into operation and effect its appellate jurisdiction. The legislature has however instituted a very elaborate system and given it the name "Appeal." It having done so, the provisions thus made are exclusive, within their full extent and scope. The appellate remedy thus provided and the laws regulating it supplant all others by whomsoever attempted to be made or put in force. This is true from the necessities of the case. Without such supremacy and exclusiveness such legislation would be ineffectual. This is true of all statutory remedies. In Humiston v. Smith,[17] the court said: "The intention was to adopt a uniform and complete system, and it is impossible to give effect to that intention if parties are at liberty to disregard the course of proceeding pointed out, the system, if it be a system at all, is necessarily exclusive, and the introduction of other remedies would destroy its uniformity and defeat the purposes of the act."

In perfect accord with the principle here stated it is well-settled that where by legislation a remedy by appeal has been given no other, for the purposes of review in the class of cases

ing usage. But as the usages of the English courts, of however long standing, had no innate force as rules or laws, but derived their sanction solely from the court which permitted them to be followed, and which had power to alter them at any time, so this court (the statutes being silent) may adopt or ratify the practice resorted to on the first occasion, when the exigencies of a cause require a reasonable and unprecedented practice to be resorted to."

17 21 Cal. 130, 135.

to which it is applicable, can be allowed. [18] Consequently,

[18] Haight v. Gay, 8 Cal. 297, 300, 68 Am. Dec. 323. To same effect, Milliken v. Huber, 21 Cal. 169; Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334, 336; Willoughby v. George, 4 Colo. 23; Munson v. Mudgett, 14 Wash. 662, 45 Pac. 306; McClain v. Williams, 10 S. Dak. 332, 73 N. W. 72; Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511. In the second case, the court said: "This court has only appellate jurisdiction, and is only authorized to issue the writ of certiorari in aid of such jurisdiction: Ex parte Attorney General, 1 Cal. 85; People v. Shear, 7 Cal. 139. If this court had jurisdiction to review the judgment on an appeal taken within one year after it was rendered, that jurisdiction was lost after the expiration of the year: Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323. The general power of supervision over inferior tribunals which pertains to the court of king's bench in England, pertains to the district court in this state. The provisions of section 456 of the Civil Practice Act, that the writ of certiorari may be granted by any court, etc., must be held to mean any court of original jurisdiction. The legislature could not, under the constitution, confer such power upon this court. Besides, by the terms of this section of the Practice Act, the writ of certiorari cannot issue in cases where there is an appeal. If there was an appeal in this case, the limitation by statute of the right to bring that appeal within one year does not make it, after a year has been suffered to elapse without taking an appeal, a case in which there was no appeal. In any view of the case, therefore, the writ was improperly issued. If it was the exercise of an original jurisdiction to superintend the proceedings of inferior tribunals, it was the exercise of a power which does not belong to this court. If it was the exercise of an appellate jurisdiction, it could not be done by the proceeding of a writ of certiorari after the time to exercise the right of appeal had elapsed." So in Sacramento etc. R. R. Co. v. Harlan, supra, the court said: "To give effect to these provisions, title 9 of the Practice Act prescribes the mode in which the appellate power of this court shall be exercised in all cases embraced within the purview of the act. Section 333 provides that 'a judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.' . . . . Is an appeal given by the statute in the case now before the court? If the decision is subject to review by this court in any form, we think the remedy is by appeal in the usual form. Section 6 of the judiciary act of 1855 has already been cited. Section 347 of the Practice Act provides that 'an appeal may be taken to the supreme court from the district courts in the following cases: First, from a final judgment rendered in an action, or special proceeding commenced in those courts,' etc. This is unquestionably a special proceeding commenced in a district court, and the determination of the court

when an appeal is given by statute a writ of error will not lie.[19] Nor can jurisdiction be conferred by stipulation.[20]

§ 467. Heads of appellate jurisdiction—Cases at law—Limitation with reference to amount involved.

With reference to cases at law the limitation as to the amount necessary to give the supreme court appellate jurisdiction was changed by amendment adopted in 1862, which was incorporated without change, in the present constitution of California.

By section 4 of article 6 of the constitution of 1849 it was provided that "the supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars. . . . . The corresponding provision in the present constitution gives the supreme court appellate juris-

in the proceeding, we think, is a final judgment rendered in a special proceeding, within the meaning of the act. The court acts judicially. A petition is filed, setting up the grounds upon which the railroad company claim to acquire the right to the land; the parties interested are summoned to appear and contest the claim. In this case they did appear and answer the petition. It was adjudged that the petitioners had brought themselves within the provision of the act; commissioners were appointed in pursuance of the act to assess the value of the land; testimony was taken and a report made to the court; and this report was confirmed by the judgment of the court. This was a judicial investigation, and the rights of the parties, and the conditions upon which the petitioners could acquire the land, were litigated and finally adjudged. The action of the court confirming the report of the commissioners was the definitive sentence or decision of the court, by which the merits of the matter in dispute in the special proceeding were determined; and this determination appears to us to possess all the essential attributes of a final judgment, within the definition given in Belt v. Davis, 1 Cal. 137. It follows from the view that we have taken that a writ of error does not lie in this case, and that it must be quashed."

19 Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323; Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 336, same conclusion, though the right of appeal, though once existing, had been lost by lapse of time, a writ of error being sought; Freeas v. Engelbrecht, 3 Colo. 383, to same point in connection with question whether the discontinuance of an appeal ought not to be treated as an affirmation of the judgment.

20 Chamberlain v. Hedger, 10 S. Dak. 290, 73 N. W. 75.

diction" in all cases at law . . . . in which the demand exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." The change in the provision was of considerable importance. There had previously been some difficulty in settling the meaning of the words "matter in dispute"; so the word "demand" was substituted for them. Interest was, under the original provision held to constitute part of the matter in dispute, while under the amendment it was expressly excluded from the calculation to determine the amount of the demand. Some differences of opinion existed as to whether the amount was to be determined by the complaint and its prayer for relief alone, or whether the defendant by admitting part and denying part of what was claimed could reduce the amount of the demand and thus wrest jurisdiction from the appellate court.[21] In Herrigan v. Ervin,[22] the court said: "Where the demand in suit is merely for money, as in this case, the supreme court has no appellate jurisdiction, unless such demand exclusive of interest amounts to three hundred dollars. In this case the demand sued for is simply for money, and amounts to only two hundred and twenty-two dollars and twenty cents. For the purpose of testing either the original jurisdiction of the justice of the peace,

21 The Washington constitution provided that the appellate jurisdiction of the supreme court should not extend to civil actions at law for the recovery of money or personal property where the "original amount" in controversy, or the "value of the property," does not exceed two hundred dollars, and it was held that the mere recital by a claimant of attached property of its value in his affidavit did not give the court jurisdiction of an appeal by him in the absence of a finding that its value exceeded two hundred dollars: Herrih v. Pugh, 9 Wash. 637, 38 Pac. 213. And in an action for damages for removal out of the state of the property subject to liens aggregating one hundred and forty-seven dollars, though the complaint laid the damages at two hundred and fifty dollars, and demanded judgment for that amount, it was held that the amount involved was one hundred and forty-seven dollars: Doty v. Krutz, 13 Wash. 169, 43 Pac. 17. The pleadings are the primary test: Schreimer v. Emel, 26 Wash. 555, 67 Pac. 228; Kirby v. Rainer Grand Hotel Co., 28 Wash. 705, 69 Pac. 378.

22 110 Cal. 37, 40, 42 Pac. 457. See, also, Maxfield v. Johnson, 30 Cal. 546.

or the appellate jurisdiction of the supreme court, the incidental costs of the plaintiff can no more be deemed a part of the demand than can the interest on the sum of money or value of the property sued for. It has often been held by this court that where jurisdiction depends on the amount in controversy, the ad damnun clause, or the sum demanded in the complaint, is the sole test." In the same case the defendant also appealed from an order denying his motion to strike out or correct a bill for costs amounting to three hundred and fifty dollars and seventy cents, and contended that it was a special order made after final judgment and was therefore appealable, within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure. The case arose in a justice's court, however, and was appealed to the superior court. Accordingly, the supreme court disposed of the claim in these words: "But the next following section (964) provides that 'the foregoing section (963) does not apply in cases appealed from justices' . . . . courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or value of the property in controversy, amounts to three hundred dollars. The cases cited to this point are cases of which the superior courts, had unquestionably original jurisdiction, and consequently cases of which the supreme court had appellate jurisdiction, and, therefore, are not applicable to this case."

But the same question was previously set at rest by the decision in Solomon v. Reese[23] where the court said: "The point made by the respondent, that this court has no jurisdiction, is not tenable. In actions for the recovery of money this court has jurisdiction, if 'the demand, exclusive of interest, amounts to three hundred dollars.' The demand, exclusive of interest, in this case, amounts to five hundred and fifty dollars. The language of the constitution in respect to the jurisdiction of this court is the same as it is in respect to the jurisdiction of the district court, and there can be, therefore, no difference in the rules by which questions as to jurisdiction of the subject matter are to be determined by the two courts. For the

23 34 Cal. 28, 32.

purpose of ascertaining whether the district court has jurisdiction we look to the complaint, and in this class of cases, if the sum sued for amounts to to three hundred dollars, exclusive of interest, that court has jurisdiction, and by parity of reason this court has jurisdiction on appeal. The amount sued for, exclusive of interest, is the test of the jurisdiction of this court, as well as that of the district court regardless of the judgment of the latter court. . . . . All civil cases which the district courts have jurisdiction to try, this court has jurisdiction to review, no matter what the judgment of the district court may have been. If the plaintiff sues to recover a demand for five hundred dollars, and the district court gives him a judgment for three hundred only, his demand does not thereby become converted into a demand for two hundred dollars, for the purpose of an appeal, should he be dissatisfied with the judgment and desire to bring his case to this court. On the contrary, in the sense of the constitution, his demand in this court is precisely the same that it was in the court below, and is to be ascertained by looking to the complaint and not by deducting the judgment of the district court from the demand alleged in the complaint. In other words, the ad damnum clause in the complaint is the test of jurisdiction in this court as well as in the court below." This decision was subsequently approved and followed.[24]

That neither costs nor interest can be made to enter into the calculation so as to give the superior court jurisdiction and hence the appellate court jurisdiction on the one hand, or to deprive a justice's court of jurisdiction on the other is also well settled.[25] But where a statute provides for taxation of costs as part of the judgment, and the statute does not ex-

24 Sanborn v. Contra Costa Co., 60 Cal. 427, applying the rule in determining the jurisdiction of a justice's court; People ex rel. v. Perry, 79 Cal. 105, 21 Pac. 423.

25 Henigan v. Ervin, 110 Cal. 37, 40, 42 Pac. 457. See, also, Lord v. Goldberg, 81 Cal. 599, 15 Am. St. Rep. 82, 22 Pac. 1126; Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864. Same view, where controversy was as to attorney's fees; Durand v. Simpson Logging Co., 21 Wash. 21, 56 Pac. 846.

pressly exclude costs, in computation of amount in fixing appellate jurisdiction, the costs enter into the computation.[26]

So strictly does the ad damnum clause of the complaint control, that the jurisdiction of a justice of the peace is not affected by the interposition of an offset or counterclaim in excess of his jurisdiction.[27] But a counterclaim may have a very different effect on the question of appellate jurisdiction when set up in courts whose jurisdiction is unlimited in amount, from whose judgments appeals may be taken to the supreme court, or to an intermediate appellate court, according to the "amount in dispute." And when a counterclaim is preferred, sufficient in amount to exceed the jurisdiction of the intermediate court of appeals, the action then involves the amount claimed in the cross-complaint, and the higher appellate court acquires jurisdiction of any appeal that is taken, though it may not have possessed it in the absence of such cross-complaint.[28] And if a counterclaimant, though obtaining a judgment in his favor, makes such admissions in his pleading as show an amount due the plaintiff within the appellate jurisdiction of the supreme court, he thereby vests a right to appeal to the supreme court in the plaintiff, which he may not have had by his complaint. And a counterclaim may so far change the character of the action as to warrant an appeal to the higher court which could not have been taken on the issues tendered in the original complaint. The counter or cross-complaint may introduce a new issue into the case which becomes the predominating issue, and authorize an appeal by virtue of a head of appellate jurisdiction not present in the action as it previously stood. He may, for instance, present a question of title; and in whatever form an issue of title is properly made,

26 Winn v. Sanborn, 10 S. Dak. 341, 73 N. W. 96.

27 Simmons v. Brainard, 14 Cal. 278; Malson v. Vaughn, 23 Cal. 61, where the court said: "It is clear that the defendant could not have brought an action in the justice's court upon the demand set forth in his answer by way of counterclaim, and the justice and county court therefore erred in not sustaining the objection of the plaintiff." See, also, Maxfield v. Johnson, 30 Cal. 546.

28 Ex parte Sweeney, 126 Ind. 583, 27 N. E. 127; Wysor v. Johnson, 1 Ind. App. 419, 27 N. E. 655. See, also, Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696; Forster etc. Co. v. Guggemas, 24 Mo. App. 444.

it becomes the dominant issue.[29] The same result is often produced by the raising of an issue of title in partition suits.[30]

Where the amount claimed by the ad damnum clause is over the minimum of jurisdiction, it is immaterial whether the appeal is by plaintiff or defendant.[31]

But the rule that the amount claimed in the complaint governs with respect to the appellate jurisdiction has reference to the complaint upon which the issues are tried; and where the plaintiff struck from the complaint an item by amendment, which reduced the amount claimed below the minimum of appellate jurisdiction, as fixed in the constitution, it was held that the judgment in the action was not appealable.[32]

The questions whether an action is properly brought under a statute, whether a recovery can be had under a statute, and whether there is any statute governing the action, are not

29 Bisel v. Tucker, 121 Ind. 249, 23 N. E. 81; Hamman v. Mink, 99 Ind. 279; Hunter v. Christian, 70 Ind. 439.

30 See Watson v. Campan, 119 Ind. 60, 21 N. E. 323; Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266; Luntz v. Greve, 102 Ind. 173, 26 N. E. 128.

31 Lord v. Goldberg, 81 Cal. 596, 51 Am. St. Rep. 82, 22 Pac. 1126.

32 Dodge v. Corliss, 28 Wash. 474, 68 Pac. 869. In this case the court said: "We think that the motion to dismiss the appeal must be sustained. The constitution provides that this court shall have appellate jurisdiction in civil actions for the recovery of money when the original amount in controversy exceeds the sum of two hundred dollars. When the respondents released one hundred dollars of their original claim, the amount in controversy was reduced to one hundred and sixty dollars. In voluntarily withdrawing this amount from the consideration of the jury, the respondents, in effect, struck from the complaint the allegation demanding damages for the sum of one hundred dollars, for attorney's fees, and thereby reduced their claim to a sum below the jurisdiction of this court. We held in Huber v. Brown, 17 Wash. 4, 48 Pac. 412, that, where the plaintiff waived or withdrew items of sufficient amount to leave a balance claimed below the jurisdictional amount, the case thereby became one of which this court could not take jurisdiction. At the time this cause went to the jury there was involved in the case only one hundred and sixty dollars, and that must be held to be the amount in controversy": See, also, Neal v. Van Winkle, 24 W. Va. 401; Nevada v. Klum, 76 Iowa, 428, 41 N. W. 62; Pacific etc. Cable Co. v. O'Connor, 128 U. S. 394, 9 Sup. Ct. Rep. 112.

questions affecting the validity of a statute, within a constitutional restriction as to appeals in actions involving an amount less than a certain sum.[33]

The issuance of original writs pertains to the original jurisdiction of both superior and supreme courts, as well as to the supervisory jurisdiction of the latter. That the appellate jurisdiction of appeals from judgments in certiorari rendered by the superior courts did not depend upon the amount involved was settled in California in Winter v. Fitzpatrick,[34] where the court said: "The jurisdiction of this court, in proceedings of this character does not depend upon the amount in controversy. Our review does not embrace the merits of the action. We look into the case no further than may be necessary to ascertain whether it is a case in which the inferior tribunal, board, or officer from which it comes had jurisdiction, and if not, whether there is any appeal, or any other plain, speedy, and adequate remedy. For that purpose we may or may not have occasion to look to the amount in controversy, but not for the purpose of adjudicating the amount, or any question involving the right of either party to a judgment upon the merits." In Bienenfeld v. Fresno Milling Co.,[35] the court, through inadvertence, overlooked that case, as it also did intermediate cases to the same effect.[36] In Heinlen v. Phillips,[37] Bienenfield v. Milling Co. was expressly overruled.

In some states an appeal is allowed to the supreme court where the action raises a question as to the validity of a statute without regard to the amount involved. It would be difficult, upon authority, to state just what form of issues would involve the validity of a statute. It was held under such a constitutional provision that the defendant was not entitled to an appeal on the ground that the decision involved the validity of a statute, the invalidity of which defendant set

33 Doty v. Krutz, 13 Wash. 169, 43 Pac. 17.

34 35 Cal. 269, 272, overruling People v. Carman, 18 Cal. 693.

35 82 Cal. 425, 22 Pac. 1113.

36 Morley v. Elkins, 37 Cal. 456; Palache v. Hunt, 64 Cal. 474, 2 Pac. 245.

37 88 Cal. 557, 26 Pac. 366.

up as one of his defenses, where the court in its instructions assumed its invalidity, and charged that the jury must find for defendant unless they found certain facts entitling plaintiff to recover notwithstanding the invalidity of the statute.[38]

§ 468. Heads of appellate jurisdiction—Cases of equitable cognizance.

No thorough, or even extensive, discussion of the distinctions between cases at law and cases in equity can be here attempted.

38 Jacobs v. Puyallup, 10 Wash. 384, 38 Pac. 994. The facts and conclusions in this case are important as showing the strictness of the requirement that the validity of the statute must be directly, rather than indirectly, involved in order to confer appellate jurisdiction under such a constitutional provision. The following appears in the opinion per Scott, J.: "The respondent moves to dismiss this appeal for the reason that the original amount in controversy was less than two hundred dollars. The appellant admits this, but contends that the decision of the cause involves the validity of a statute. The action is founded upon the following circumstances: Plaintiff is an attorney at law, and claims to have been employed by certain citizens of the city of Puyallup, prior to its incorporation, who were purporting to act for the inhabitants at large, to take the necessary steps to incorporate said city, and that by virtue thereof said city became indebted to him in the sum of one hundred and forty dollars. Prior to said employment there had been an attempted incorporation of said city, which, however, was, or was supposed to be, invalid, and the employment of the plaintiff was by the city council as it existed under such prior incorporation. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled, whereupon issue was joined, and one of the defenses relied upon was the invalidity of the prior incorporation and want of authority, upon the part of the persons purporting to represent the city, to employ the plaintiff to perform the services in question. But in submitting the case to the jury, the court expressly instructed them that unless they found that the plaintiff was employed on behalf of the people of the city of Puyallup to perform the services alleged, and that such services were performed, and were necessary to such reincorporation, and that the defendant accepted the benefits thereof, and ratified such employment, and agreed to pay for the same, they must find for the defendant. In so submitting the case to the jury all question as to the validity of the statute was eliminated from the case, and the rights of the plaintiff were made to depend upon the question of fact only; and the amount recovered being less than two hundred dollars the motion to dismiss must prevail."

In order, however, to determine whether an appeal will lie from the superior to the supreme court merely because the case is of equitable cognizance, regardless of the amount involved, some attention must be given to the subject. Some of the judicial expressions are somewhat misleading; or perhaps it would be more proper to say, lack that fullness of expression necessary to dissipate all doubt on the subject. In one case[39] the court remarked that "The district judge whilst sitting in an equity cause, is possessed of all the powers of a court of chancery," meaning, as the context and authorities cited show, the jurisdiction administered in the high court of chancery in England. But the district courts passed away and the superior courts succeeding them now possess what may not be termed an enlargment of that ancient jurisdiction, but the power to exercise it in new cases presented from time to time. Cases are constantly arising under acts of legislation, requiring to be decided upon equitable principles, but which present features unknown to the ancient courts of chancery.[40]

There is, however, a difference, often easily perceivable, and sometimes indistinct, between cases purely equitable and those which, though legal, are determined upon equitable principles. Of all the former, the supreme court has appellate jurisdiction, while it has jurisdiction of the latter only when the amount claimed is sufficient to give it jurisdiction.[41] All courts should be guided by equitable principles in all cases in the absence of a positive rule of law forbidding it. But it is only all cases in which strict equity jurisdiction is called into exercise, and equitable relief, if any, must be awarded, which may be appealed to the supreme court regardless of the amount claimed, or other feature.

That a specific sum of money is to be awarded by the court is not a test by which to determine whether the action be legal

39 Sanford v. Head, 5 Cal. 297, 299.

40 See Brock v. Bruce, 5 Cal. 279, action to foreclose mechanics' lien; People v. Mier, 24 Cal. 61, action to foreclose lien for taxes; Marlstadt v. Branc, 34 Cal. 577, action to foreclose lien for street assessments.

41 See Baker v. Groves, 126 Ind. 593, 26 N. E. 1076, for exemplification; Barto v. Seattle etc. Ry. Co., 28 Wash. 179, 68 Pac. 442.

or equitable. A suit to foreclose a mortgage has for its main object the recovery of money but the fact that in addition to such recovery the suit has for a specific object the foreclosure of a lien, renders the action equitable within the maxim, "Equity acts specifically and not by way of compensation." And the same principle extends to suits to foreclose chattel mortgages,[42] and to creditors' suits to set aside conveyances on the ground of fraud.[43] And the same principle, was applied in an action to rescind a contract of deposit on the ground that the bank was insolvent at the time of the deposit, though the amount was less than the jurisdictional minimum.[44] On the other hand, it was held that an appeal could not be taken where the sum claimed was less than the constitutional minimum in an action for the conversion of property on which the plaintiff had established a lien in a prior suit.[45]

§ 469. Same—Cases of equitable cognizance in justices' courts.

Under the present constitution of California the supreme court has appellate jurisdiction only of such cases in equity as arise in the superior courts. It provides that, "The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts." [46]

Whenever a case is found to be one which in its essence is of equitable cognizance, an appeal lies therein from the decision of the superior court regardless of the amount involved, except where such decision is of a case appealed from a justice's court. Under the same constitution justices have juris-

42 Brown v. Russell, 105 Ind. 46, 4 N. E. 428.

43 Fenton v. Morgan, 16 Wash. 30, 47 Pac. 214.

44 Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

45 Garneau v. Port Blakely Mill Co., 20 Wash. 97, 54 Pac. 771. To same effect, Durand v. Simpson Logging Co., 21 Wash. 21, 56 Pac. 846. Where lumber upon which plaintiff claimed a lien was removed by defendant, and rendered incapable of identification, the action is one for damages and the supreme court has no appellate jurisdiction thereof if the amount involved is less than two hundred dollars: Chapin v. Kenoyer, 12 Wash. 536, 41 Pac. 916.

46 Art. 6, § 4.

diction of only one class of cases of equitable cognizance, namely, cases where it is sought to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.[47]

The combined effect of the constitutional provision is to give the superior courts and justices' courts concurrent jurisdiction in those cases, with the incidental right to elect in which the action shall be brought; but if the justice's court be selected, the only appeal that can be taken is to the superior court, while if the action be brought in the superior court, an appeal may be taken to the supreme court. Accordingly, it was held that the supreme court had no jurisdiction under the constitution, of an appeal from a judgment rendered in the superior court, upon appeal from a justice's judgment in an action brought under section 1206 of the Code of Civil Procedure, to enforce disputed claims of employees of an execution debtor for wages of which payment was claimed out of the proceeds of a sale of personal property levied upon by the sheriff, whether the action be viewed as a suit in equity to enforce liens upon personal property, or as an ordinary action for wages due.[48]

§ 470. Heads of appellate jurisdiction—Divorce cases.

The leading case in California affirming the appellate jurisdiction in divorce cases regardless of the question of property rights involved, is that of Conant v. Conant.[49] Although the constitution does not confer the jurisdiction in express terms, yet the jurisdiction was maintained, the court giving its reasons as follows, after quoting the fourth section of the sixth article of the constitution then in force: "We do not understand the last words of the first clause of the section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost, or municipal fine. As we read the section, the court possesses

47 Art. 6, § 11.

48 Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

49 10 Cal. 250, 70 Am. Dec. 717, criticised in Dunphy v. Guidon, 13 Cal. 30.

appellate jurisdiction in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question. Similar language, as to the amount, is used in defining the original jurisdiction of the district courts. The sixth section of the same article declares that, 'the district court shall have original jurisdiction, in law and equity, in all civil cases, when the amount in dispute exceeds two hundred dollars exclusive of interest. It could never have been the intention of the framers of the constitution to deny to the higher courts, both original and appellate, or any jurisdiction, in that large class of cases where the relief sought is not susceptible of pecuniary estimation—such as suits to prevent threatened injury—respecting the guardianship of children—honorary offices, to which no salary is attached, and the like. And yet, to this result, the position of the respondent directly leads. We think the construction contended for too narrow, and not imperatively required by the language of the constitution." This view was followed, without important dissent, in several subsequent cases. In 1862 the constitution was amended so as to extend the appellate jurisdiction to all cases in equity, thus furnishing additional support to the conclusion reached in the main case. In Sharon v. Sharon,[50] Sharpstein, J., in the course of a learned opinion of the court said: "It is therefore not surprising that this court should have uniformly regarded actions of divorce as 'cases in equity.' The fact that it did so regard them is too clear to admit of doubt, and and that being so, its reasons for so regarding them are not now important. Our position is that for a period of thirty years next preceding the adoption of the present constitution, actions of divorce were uniformly held to be 'cases in equity,' and that the framers of the present constitution were aware of that when they conferred on this court jurisdiction 'in all cases in equity'." The jurisdiction seems never to have been questioned in any subsequent case, though many such cases have been reviewed.

[50] 67 Cal. 185, 193, 7 Pac. 456, 635, 8 Pac. 709.

The same principle which controlled the decision in the cases above cited—namely, that a divorce suit is of equitable character—governs orders in divorce cases allowing alimony and counsel fees. In Langan v. Langan,[51] an appeal from an order allowing one hundred and fifty dollars as counsel fees, was dismissed without discussion, the court merely saying: "The appeal from the order allowing one hundred and fifty dollars counsel fees must be dismissed, because the amount in dispute is too small to give the court jurisdiction." This decision was overruled in Harron v. Harron,[52] which was an appeal from an order allowing one hundred dollars for counsel fees, the court saying: "As the appellate jurisdiction of this court extends to all cases in equity, it also includes all questions in a case in equity upon which a review of the action of the superior court may be had." Referring to the prior case the court said: "We are satisfied, however, that the reason there given is not justified by a proper construction of the provision (referring to the constitution), and as no rights have grown up by reason of the decision, we feel authorized to disregard it in favor of the proper construction to be given to the constitutional provision."

§ 471. Heads of appellate jurisdiction—Cases involving title or possession of real estate.

By the constitution, of California of 1879 it is provided that "the supreme court shall have appellate jurisdiction . . . . in all cases at law which involve the title or possession of real estate."[53] Here the amendment to the constitution of 1849 made in 1862 is embodied, so that all decisions between the adoption of the amendment and the adoption of the new constitution are applicable to the subject.

In the constitution the words, "cases at law," are variously limited. It is convenient and instructive to observe that "cases at law" is first limited by the limitation as to the amount, and "cases at law" is again limited by the words, "which involve the title or possession of real estate." "It will be seen

51 83 Cal. 618, 23 Pac. 1084.

52 123 Cal. 508, 56 Pac. 334.

53 Art. 6, § 4.

upon examination of the constitution, that the cases to which the appellate power extends are carefully defined, and that (with the exception of cases arising in the probate court, and criminal cases amounting to felony), no case is, by its terms, subject to review here in the exercise of our appellate power, unless it be a case in equity, or a case at law of a defined character." [54]

For the purposes of the appellate jurisdiction it is not required that the title or possession be soley or even directly involved; it is only necessary that it be one of the issues to be determined in the action, as when the action was for the recovery of the defendant's shares of a partition fence.[55] And in Hart v. Carnall-Hopkins Co.,[56] the court said: "If the issue of title is so involved that it must be decided in order to determine the case, the superior court has original, and this court appellate jurisdiction, whether the involution may be said to be merely incidental or not." In a case subsequent to Holman v. Taylor, without questioning the correctness of the decision in that case, the court took occasion to criticise its own too liberal language in deciding it, saying: "In Holman v. Taylor, the title of the respective parties to certain parcel of real estate was in issue, and in ascertaining the meaning of the constitution 'all cases at law which involve the title or possession of real property,' the subject of possession was considered, but only by way of argument, and for the purpose of illustration; and in the discussion our language was not in all respects sufficiently guarded and definite. To constitute a case which involves the possession of real property, it is not enough that the possession is a fact in controversy, or incidentally in question, or that the fact of possession is in issue; but the right of possession must be involved in the action. The paraphrase of the clause of the constitution, given in Holman v. Taylor, would be more accurate, and would more fully express our idea of the meaning of that clause, if given in this language: 'Cases at law in which the title or right of

54 Concurring opinion of Wallace, J., in Appeal of Houghton, 42 Cal. 35, 60.

55 Holman v. Taylor, 31 Cal. 338, 340.

56 103 Cal. 132, 37 Pac. 196. To same effect, Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256.

possession of real property is a material fact in the case, upon which the plaintiff relies for recovery, or the defendant for a defense. The allegation of the right of possession is quite different from that of possession in fact, which may constitute merely the basis of some right or claim constituting the cause of action, or the defense to the action. In an action for use and occupation, the possession of the defendant may be alleged on the one side and denied on the other without presenting an issue as to the right of possession. And so, in an action of trespass upon real property, the plaintiff may recover upon allegation and showing, in addition to the injury complained of, his possession of the premises; and his right to the possession is not involved unless the defendant tenders an issue upon that fact, and in such case, as was said in Holman v. Taylor, the right of recovery depends both upon possession in fact and the right of possession. In our judgment, it was not the intention to withdraw from justices of the peace and other inferior courts, and confer upon the district courts, jurisdiction of cases of the character of those mentioned, in which the right of possession is not involved; but it was intended to give to the latter courts jurisdiction of cases involving the right of possession of real property."[57] The language is, no doubt, a correct exposition of the law on the question.

The court in determining whether the title or possession is involved will not be governed by the mere form of the answer, Accordingly, it was held that an issue as to title or possession could not be introduced into a case merely by an averment on the point of the defendant that it was involved when in fact it was not.[58]

It is a very general principle that the possession of a tenant is that of the landlord, and therefore, it is rarely that the title or right of possession can be put in issue in an action to recover leased premises. But there is no doubt that cases may arise in which the title or right of possession might become in-

57 Pollock v. Cummings, 38 Cal. 683, 685, cited and approved in Cornett v. Bishop, 39 Cal. 319. See, also, Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941, holding that an ordinary action for trespass on real property, no answer being made, did not involve title or possession.

58 Ghirardelli v. Greene, 56 Cal. 629.

volved in such an action, for instance, if the party sued as tenant should set up a defense requiring an adjudication upon the title of the landlord as affecting the question of the relation claimed by him to exist between them. It is true that the doctrine of estoppel would in most cases come to the aid of the landlord, but suppose the defense were that by the act of the landlord himself, or by operation of law the title of the landlord has since the execution of the lease passes to another, under whom the tenant holds. In that case the question of title would become the dominating issue, completely subordinating that tendered by the plaintiff touching the relation of landlord and tenant.[59]

§ 472. Heads of appellate jurisdiction—Cases involving legality of tax, impost, assessment, or municipal fine.

The California constitution of 1879, confers appellate jurisdiction upon the supreme court "in all cases at law which involve the legality of any tax, impost, assessment, toll, or municipal fine." It is a literal transcript from the amended section on the same subject, adopted in 1862. The provision in the constitution of 1849, is scarcely distinguishable from it, there being no difference in legal effect worth while to discuss. It is seen that in order to give the appellate court jurisdiction it is necessary that the legality of the charge must be involved, Accordingly, where the question is merely as to the amount of the charge, the jurisdiction does not become vested; for instance, where the action was to recover a penalty for collecting more than the legal rate of toll.[60] In this case the court said: "It is not pretended that the rates of toll as fixed by the board of supervisors, were illegal in any respect. The demand and recovery by the toll-gatherer of a larger amount than that fixed by the board was not a collection of tolls, but an act of

[59] See Kinney v. Doe, 8 Blackf. (Ind.) 350; Elliott v. Smith, 23 Pa. St. 131; Sharpe v. Kelley, 5 Denio, 431; Fuller v. Sweet, 30 Mich. 237, 18 Am. Rep. 122. In such case if the action were brought before a justice of the peace he would immediately lose jurisdiction: Kiphort v. Brenneman, 25 Ind. 152; Burgett v. Bothwell, 86 Ind. 149.

[60] Brown v. Rice, 52 Cal. 490.

extortion, for which the statute prescribes certain penalties and consequences. The party aggrieved may sue for and recover the penalty in the proper court, but the jurisdiction of the court must be determined—as in the case of other money demand—by the amount claimed. The amount claimed was less than three hundred dollars." The question in that case was as to the jurisdiction of the district court, but the same test would apply in determining the appellate jurisdiction of the supreme court. In a case where a foreclosure of a lien for taxes was sought, the court held it to be a case in equity, and that the jurisdiction was in the district court, without regard to the amount.[61]

The legality of the charge in such cases is usually put in issue by the answer. In the case last cited, the court, after quoting the clause of the constitution now under consideration, said: "In cases where these defenses are set up in the answer, perhaps the legality of the tax would be involved, within the meaning of this provision of the constitution. If so, the jurisdiction of the justice would be ousted on the filing of the answer." A case in which the question of legality and of jurisdiction was properly raised, was that of Santa Barbara (City of) v. Stearns.[62] As usual it was raised by the answer. It was an action to recover the amount alleged to be due for

[61] People v. Mier, 24 Cal. 61, 72. To same effect, Mahlstadt v. Blanc, 34 Cal. 580. In Bell v. Crippen, 28 Cal. 327, the plaintiff (evidently in some official capacity, though no official character appears in the report of the case) sued in the district court for the recovery of taxes amounting to less than three hundred dollars, without praying the foreclosure of any lien. The only point raised by the defense was as to the jurisdiction. The supreme court held the objection well taken.

[62] 51 Cal. 499. See, also, Santa Barbara v. Eldred, 95 Cal. 380, 30 Pac. 562; Williams v. McCartney, 69 Cal. 556, 11 Pac. 186. In the second case above, the court, per Justice Garoutte, stated the facts and its conclusion in the following language: "Action brought in the police court to recover city taxes assessed against the property of appellant. A demurrer to the complaint was overruled, whereupon appellant answered, setting forth, among other matters, that the common council had no power to levy the tax, that the same was illegal and void, and asking that the action be transferred to the superior court for trial, under the provisions of section 838

a wharf license, according to the provisions of an ordinance of plaintiff city. The action had been brought in the police court. The only point passed upon was jurisdictional, the court holding that the police court had no jurisdiction. After declaring the charge to be a tax, the court said: "The police court, therefore, upon the filing of the answer, had no jurisdiction to proceed with the trial of the action."

§ 473. Heads of appellate jurisdiction—Cases of forcible entry and detainer.

The appellate jurisdiction in cases of forcible entry and detainer is not to any extent dependent upon the provision of the constitution of California, adopted in 1879, declaring it "in cases of forcible entry and detainer." Such jurisdiction was freely exercised under the former constitution, such cases

of the Code of Civil Procedure. The application for a transfer was denied, and the court proceeded to hear the cause upon its merits, whereupon judgment was rendered for plaintiff for the sum demanded and costs. Appellant took an appeal to the superior court from the judgment on questions of both law and fact, and judgment was again rendered in favor of respondent. A motion for a new trial, based upon a statement of the case, was denied, and this appeal is prosecuted from the judgment and order denying a new trial. If the answer of appellant, filed in the police court, did not raise an issue as to the legality of the tax sought to be recovered, it follows that the judgment of the superior court was final, and this appeal should be dismissed, but upon an examination of the pleadings, it is apparent that such an issue is presented." In the third case the court, after quoting section 638 of the Code of Civil Procedure, gives further explanation as to the method of putting in issue the legality of a municipal tax as follows: From these several statutory provisions it appears: 1. That a justice's court has jurisdiction of an action to recover a sum of money less in amount than three hundred dollars, for a fine, penalty, or forfeiture, given by statute or ordinance of a municipal corporation, provided no question of the legality of any tax, impost, assessment, toll, or municipal fine is raised; 2. That if any such question is made, it must be by answer, verified by the oath of the defendant; and 3. Unless so raised, no evidence as to such legality can be received. As the answer in the present case raised no question touching the legality of the municipal ordinance or proceedings under which the indebtedness accrued, we must, for all the purposes of the cause, presume there was in fact no controversy on that subject."

being held to involve the right of possession of real estate. and the terms "forcible entry and detainer" were simultaneously held to include unlawful detainers. In Caulfield v. Stevens[63] the court said: "It cannot be denied but that actions, either for a forcible or unlawful detainer, involve the possession of real property. Their primary object is to obtain that possession of lands and tenements which has been forcibly taken, or is forcibly or unlawfully detained. The recovery of rents and damages is incidental to the recovery of possession, and the former cannot be had without the latter. The possession of real property is therefore as much involved in these actions as in an action of ejectment." In view of later decisions, previously noticed, the above language requires some limitation. The word "possession" should be prefixed with the words "right of."

§ 474. Heads of appellate jurisdiction—Actions to abate nuisances.

It was not necessary, as was done, to add to the provision on the subject of appellate jurisdiction in the constitution of 1879, a further and express provision conferring jurisdiction in actions to abate nuisances, since these are, and have been, from time immemorial, treated and adjudicated as cases in equity. In Courtright v. Bear River Co.,[64] the court said: "At common law, an action on the case of damages was the usual remedy for the injuries occasioned by the nuisance—

63 28 Cal. 118, 121. See, also, Brummagin v. Spencer, 29 Cal. 662; Stoppelkamp v. Mangeot, 42 Cal. 324; Johnson v. Cheely, 43 Cal. 304.

64 30 Cal. 573. In this case the court said: "The defendants by their answer denied all the allegations of the complaint, and then proceeded to deny the plaintiff's title or right of possession of the premises described in the complaint, and alleged that said title and right of possession were in some other party under whom defendants entered upon and held possession of said premises. It is claimed by their counsel that this put the title or possession of real property, and ousted the justice's court of its jurisdiction. We do not think that this claim is well founded. The real questions in issue were the making of the lease, the entry under it, and rent due. If the defendants entered under a lease they could not dispute the title of their landlord. If they did not enter under a lease, he could not recover in this action, because he based his right to

the other forms of action having gone into disuse; but in that action the nuisance could not be ordered to be abated. Where the injury was such that it could not be adequately compensated by damages at law, or its nature was such that it would be a constantly recurring grievance, resort could be had to a court of equity, which would afford the proper relief by injunction or an order that the nuisance be abated."

§ 475. Jurisdiction in action of claim and delivery—How value tested.

The appellate jurisdiction of the supreme court of California is fixed by other methods than amount or value in all cases, other than where a compensatory judgment is sought or specific personal property is claimed. As to the action of replevin, (termed in the statute "claim and delivery"), there can be no difficulty. Under the provisions of the code,[65] the actual value of the property claimed must be stated in an affidavit which must be in all cases filed with the complaint, and the jury or other triers of the issue must find its value. Therefore, the provision in the constitution, as to value of property involved, as a test of jurisdiction, is of little or no importance. The value of real property is of no importance, because the appellate jurisdiction exists without regard to value, if the title or possession is involved;[66] and the ad damnum clause in the complaint or affidavit of claim and delivery, as well as the judgment, must be in the alternative, the allegation of actual value therein being decisive on the ques-

recover upon such a lease. Therefore, the defendants' allegation of title in somebody else raised an immaterial issue, and that allegation might have been stricken out or disregarded altogether. If the defendants had set up in their answer an eviction under title paramount to that of the plaintiff, the case might be different. But in the absence of any such plea, the defendants were concluded upon the question of title by entering under a lease from the plaintiff."

[65] Cal. Code Civ. Proc., §§ 510, 627. Where the value of the entire property sought to be recovered in replevin exceeded the minimum of appellate jurisdiction, it was immaterial that separate parcels of the same claimed by interveners was of value below such minimum: Goodyear Rubber Co. v. Schreiber (Wash.), 69 Pac. 648.

[66] See ante, § 471.

tion of jurisdiction, as in other cases. The amount of damages claimed appears to be no criterion and not to be considered in fixing the jurisdiction.[67]

No affidavit is required as to the damages, and since damages are not mentioned in the constitutional provision on the subject, it was evidently the intention of its framers that damages should not enter into the calculation.

§ 476. Heads of appellate jurisdiction—Probate matters.

The constitution of 1879, confers appellate jurisdiction "in all such probate matters as may be provided by law." This is clearly a delegation of power to the legislature to prescribe, circumscribe or limit, as well as to regulate the jurisdiction. The constitution in this instance granted the jurisdiction to remain dormant until the legislature saw fit to give it form and vitality. The constitution of 1849, contained no provision conferring appellate jurisdiction in probate matters. The amendment of 1862, went to the other extreme and conferred appellate jurisdiction "in all cases arising in the probate courts." It did not, however, provide any method by which the jurisdiction should be exercised, and since appeal is statutory, legislation was necessary to make the jurisdiction operative.

Under the present constitution the power to provide methods for exercising its appellate powers in probate cases is expressly withheld from the court by the effect of the provision itself. Therefore, the statutes on the subject must be referred to, to determine what orders are appealable.[68]

§ 477. Heads of appellate jurisdiction—Special cases.

It will be observed that the first constitution of California did not mention special cases or special proceedings in the enumeration of litigated matters of which the supreme court has appellate jurisdiction. In numerous cases the supreme court assumed jurisdiction of appeals in special cases, no question being raised as to the jurisdiction. When formerly the point was made against the jurisdiction, the court gen-

67 See Astell v. Phillips, 55 Cal. 266.

68 See post, § 511 et seq.

erally, but not uniformly denied its existence. The question was first given serious consideration in the appeal of S. O. Houghton,[69] a proceeding under the provisions of an act entitled "An act to authorize the board of supervisiors of the city and county of San Francisco to modify the grades of certain streets." The act made the action of the county court upon the report of the commissioners conclusive. It was contended, first, that the act was unconstitutional, and secondly, that it was a case at law and for that reason within the appellate jurisdiction of the supreme court. But the court decided adversely to these views, saying: "But it is claimed by the appellant that, if the statute be construed as prohibiting an appeal, it is, pro tanto, unconstitutional, inasmuch as the constitution confers upon this court appellate jurisdiction in this class of cases. The constitution, article 6, section 4, confers upon this court appellate jurisdiction 'in all cases in equity; also, in all cases at law which involved the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.' Section 6 confers upon the district courts original jurisdiction in all these cases, in precisely the same language; and section 8 confers upon the county courts original jurisdiction, 'of all such special cases and proceedings as are not otherwise provided for.' The argument is that this is a 'case at law,' which involves the legality of an assessment, in the true sense of article 6, section 4, of the constitution, and not a 'special proceeding,' in the proper sense of section 8. But it is too plain to admit of debate that this is not a 'case at law,' within the meaning of section 4, and that it is a 'special proceeding,' within section 8, of which the county court has original jurisdiction. From an early period in the history of the state down to the present time proceedings for the opening, grading, extension, paving and alteration of streets, and the assessment of damages caused thereby, have been treated by the legislature and the courts as 'special proceedings,' and not as 'cases at law.' This court, in numerous decisions, has acquiesced in and directly affirmed this view of these cases; and the doctrine has become too firmly established to be open to discussion at this late day.

[69] Houghton (S. C.), Appeal of, 42 Cal. 35, 56.

This, therefore, must be deemed a 'special proceeding,' of which the county court could properly take juridiction, and not a 'case of law,' involving the legality of an assessment, of which the constitution confers upon this court appellate jurisdiction. But if it were otherwise, and if this were to be deemed a case at law, involving the legality of an assessment, I do not perceive how it would benefit the appellant in respect to the damages which he claims. For, if this be a case of that character, it was not competent for the legislature to confer jurisdiction of it upon the county court, inasmuch as the constitution, in expressed terms, confers upon the district courts original jurisdiction in that class of cases; and it is well settled that the jurisdiction in such cases is exclusive, unless there be something in the instrument evincing a contrary intent. If the appellant had succeeded in convincing us that this is a case at law, involving the legality of an assessment, we would have been constrained to hold that the act conferring jurisdiction on the county court was unconstitutional and void, and the whole machinery for enforcing the assessment would have fallen with the act."

The mere fact that a proceeding is a legal controversy prosecuted according to the forms of law, does not constitute it a case at law within the meaning of these terms as used in the constitution. In the case last cited, Wallace, J., in a concurring opinion, said: "It is argued by the appellant that the case is 'a case at law,' one involving the legality of an assessment, and, therefore, within the jurisdiction of this court to hear and determine. But even if it can be said to involve the legality of an assessment, I think it clear that it is not a case at law within the intent of the constitution. It is said that it is a legal controversy, prosecuted according to the forms of law, and that, therefore, it is a case at law; but though it be such controversy, and so prosecuted, it does not follow that it is a case at law in the sense of not being a special case. A special case may be said to be a legal controversy, prosecuted according to the forms of law, and yet the constitution itself has distinctly provided that the jurisdiction in special cases shall be in the county court, unless otherwise provided for. A special case can no more be said

to be a case at law, in a constitutional sense, merely because it is a legal controversy prosecuted according to the forms of law, than it could be said to be a case in equity, because its solution might involve a consideration of the principles of equity, or the judicial proceedings provided for its determination were similar in form to those usually observed in courts of equity."

Special cases are otherwise defined in a negative form of expression as "not cases for which the courts of general jurisdiction had always supplied a remedy."[70] Special cases are special proceedings characteristically differing from ordinary suits at the common law;[71] and which do not proceed according to the course of the common law, but give new rights and afford new remedies.[72]

Between the date of the decision in Houghton's Appeal and that of Bixler's Appeal,[73] there appears considerable conflict and confusion in the minds of the court on this subject, which it is unnecessary to notice in great detail. Notwithstanding the decision in the first-mentioned case, the court continued occasionally to entertain jurisdiction on appeal in special cases without question or comment, and in Stockton etc. R. R. Co. v. Gagliani,[74] virtually overruled it, but without express reference to what it decided. The court referred to numerous cases antedating that case which affirmed the jurisdiction, and said: "In view of these cases, we do not think a reconsideration of the question at this time would be profitable, and hold that this court has jurisdiction of this appeal." Jurisdiction of appeals in special cases was thereafter freely entertained down to the date of the decision in Bixler's Appeal.[75] In the last-mentioned case, the rule of Houghton's

70 Parsons v. Tuolumne etc. Water Co., 5 Cal. 43, 63 Am. Dec. 76.

71 Jackson v. Day, 15 Cal. 91.

72 Saunders v. Haynes, 13 Cal. 145. See, also, Brock v. Bruce, 5 Cal. 280; Ricks v. Reed, 19 Cal. 551; People v. Kern Co., 45 Cal. 679; Bixler's Appeal, 59 Cal. 550.

73 59 Cal. 550.

74 49 Cal. 139.

75 59 Cal. 550. See Loomis v. Andrews, 49 Cal. 239; Southern Pac. R. R. Co. v. Wilson, 49 Cal. 396; Matter of Market St., 49 Cal.

Appeal, denying the jurisdiction, was again asserted upon what appears to have been a careful review of all preceding decisions, reinforcing, with new arguments, in addition to those advanced in the former case. Thereafter, Lorenz v. Jacobs and California Southern R. R. Co. v. Kimball,[76] both special proceedings, in fact, but in the form of civil actions, came before the court and were reviewed without a question being raised as to the jurisdiction. A few other special cases have been passed upon in the same way, and generally, where no question was raised by the respondent, the court entertained the appeal. In Lord v. Dunster,[77] an election contest was brought up on appeal. Counsel for respondent cited and relied upon the Houghton and Bixler's cases, and cited abundant authority to show that an election contest is a special case. The court, tacitly admitting that it was a special case, concluded upon authority of cases antedating the Houghton and Bixler's cases, that it had no right to decline to exercise jurisdiction, saying, in the course of the opinion: "Neither Houghton's Appeal nor Bixler's Appeal were contested election cases, and the exigencies of this case do not require us to approve or disapprove what was said therein." Taking the opinion altogether, it contains not a line which distinguishes the case in principle from those former cases. Subsequently, the court has entertained and passed upon appeals in election contests without a doubt being suggested as to the jurisdiction.[78]

But authorities are ample to support the appellate jurisdiction in all special cases, with or without a legislative provision authorizing an appeal. Late decisions have settled the

547; Northern Pac. R. R. Co. v. Reynolds, 50 Cal. 90; Wilmington C. & R. Co. v. Domingues, 50 Cal. 505; Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269; Wymon v. Lemon, 51 Cal. 274; Mish v. Mayhew, 51 Cal. 514; Ventura Co. v. Thompson, 51 Cal. 577; Covurbias v. Supervisors, 52 Cal. 622; Crawford v. Dunbar, 52 Cal. 37; Delphi School Dist. v. Murray, 53 Cal. 29; Stewart v. Mahoney Min. Co., 54 Cal. 149; Donnelly v. Potter, 55 Cal. 474; City of San Jose v. Freyschlag, 56 Cal. 8; Cummings v. Peters, 56 Cal. 593; Preston v. Culbertson, 58 Cal. 198; Coffey v. Edmonds, 58 Cal. 521.

76 59 Cal. 262 and 61 Cal. 90, respectively.

77 79 Cal. 477, 21 Pac. 865.

78 See Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

question in favor of the jurisdiction in California for the present, at least. The whole question was discussed in Morton v. Broderick,[79] and the jurisdiction upheld, the language of

[79] 118 Cal. 474, 483, 50 Pac. 644. See, also, McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 44 Pac. 358. Before quoting from Morton v. Broderick, cited in the text, it is necessary to call attention to an incongruity in the language of Justice Henshaw, delivering the opinion. He says: "The matter will be discussed upon the assumption that it was a civil action, since otherwise it cannot be upheld." The whole discussion which follows is on the assumption that it is a special case or special proceeding which in fact it is. He proceeded thus: "Treating, then, the judgment in the case of Fitch v. Board of Supervisors as a judgment rendered in a special civil proceeding of summary character, it is next insisted by respondent that the constitution has not provided for appeals in such proceedings, that the legislature has not the power to do so, and that the judgment of the trial court is, therefore, an absolute finality. Were this question a new one, much weight would be due respondent's argument upon the matter. But for the following reasons it cannot be opened for decision as res nove et integra: 1. Because, under identical language in the earlier constitution of the state (Const. 1849, art. 4, § 19; Const. 1879, art. 4, § 18), it was held by our predecessors that the constitution itself empowered the legislature to provide for appeals in special proceedings; 2. In reenacting in the later constitution the language of the earlier, it will be concluded that it was adopted with the interpretation and construction which the courts had enunciated (Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac, 709; Lord v. Dunster, 79 Cal. 477, 21 Pac. 865; McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 44 Pac. 358); 3. Since the adoption of the present constitution, this court, in accordance with that principle and under the authority of sections 52 and 939 of the Code of Civil Procedure, has unquestionably retained jurisdiction of such appeals in a multitude of cases of different kinds; and this long acquiescence and sanction both by the legislature and by the courts fixes the construction; 4. The precise question was before this court in bank in 1889, and it was then held without dissent that the present constitution was not more restrictive than the earlier, and that the supreme court had appellate jurisdiction in such cases: Lord v. Dunster, supra. It is said: "Under these circumstances, and in view of the fact that there is nothing in the language of the constitution of 1879 making the original jurisdiction of the superior court final or conclusive to any extent greater than was that of the county court in such cases, or restricting the right of appeal to this court, we do not feel called upon to say whether the reasoning of the court in Knowles

the court being, and doubtless intended to be, broad enough to cover all that class of cases. No attempt was made to support the jurisdiction upon any original reasoning, the argument proceeding entirely upon the doctrine of stare decisis.

In Idaho, under constitutional provisions considerably broader than those of California, the appellate jurisdiction of the supreme court in special cases is firmly established.[80]

§ 478. Heads of appellate jurisdiction—Criminal cases.

The constitutional provision conferring appellate jurisdiction expressly confers it "in all criminal cases prosecuted by indictment or information in a court of record, on questions of law alone."[81] The legislature has not provided for an ap-

v. Yates is sound. It is sufficient to say that the conclusion therein reached has been sanctioned by long acquiescence on the part of the legislature and the courts. It has been decided that 'a contemporaneous exposition, even of the constitution of the United States, practiced and acquiesced in for a period of years, fixes the construction': 1 Kent's Commentaries, 465, note; Packard v. Richardson, 17 Mass. 143, 9 Am. Dec. 123; Curtis v. Leavitt, 15 N. Y. 217; People v. Fitch, 1 Cal. 523; Civ. Code, § 3535. When the framers of the constitution employ terms which have received judicial interpretation, and have been put into practice under a former constitution so as to receive a definite meaning and application, it is safe to give them the signification which has been sanctioned by such interpretation, unless it is apparent from the language used that a more general or restricted sense was intended. In determining the meaning of a constitutional provision, it will be presumed that those who framed and adopted it were conversant with the interpretation which had been put upon it under the constitution from which it was copied; and this is the rule even as to provisions taken from the constitutions of other states—the judicial construction placed upon them in the states from which they are taken will be followed by the courts in the state which adopts them." Lastly, in In re Marks, 45 Cal. 199, which was a special proceeding such as this to remove an officer for misconduct, it was held that an appeal would lie. In that case, the act itself provided for an appeal, while now the right of appeal is conferred by sections 52 and 939 of the Code of Civil Procedure.

80 Miller v. Smith (Idaho), 61 Pac. 824, judgment removing a county commissioner; Wilson v. Bartlett (Idaho), 62 Pac. 415. Judgment in action contesting election for removal of county seat.

81 Cal. Const. 1879, art. 6, § 4.

peal in any criminal case below the grade of felony, but has rather attempted to limit appeals to that grade. It has provided that, "Either party in a criminal action amounting to a felony, may appeal to the supreme court, on questions of law alone, as prescribed in the chapter." [82]

The subject was very thoroughly considered and learnedly discussed by McKinstry, J., in People v. Jordan,[83] and without expressly referring to the limitation attempted by the above-quoted section of the Penal Code, treated it as a casus omissus, held that an appeal would lie in all misdemeanor cases prosecuted by indictment or information, and adopted for the future, the forms of appellate procedure pursued in that case, which conformed to the provisions of the Penal Code for felony cases, saying: "If casus omissus in the procedure established by law and written rules is called to our attention in advance, we may, by rule provide for it; if not, when the case is presented, we must adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases until altered by statute or rule. The power of courts to establish a system of procedure, by means of which, parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent. A fortiori must this be so in California, where the judicial is a separate department of the government under our written constitution. Applying these principles to the case in hand, the defendant here was prosecuted by indictment, and the legislature has failed to provide any machinery for taking an appeal from a judgment for or against him. We are confronted by the duty, imposed by the constitution, of reviewing the proceedings of the court below. We entertain no doubt that we have the power of declaring, and that it is our duty to declare, how this and like cases may be brought here for review. We may issue to the lower court a writ of mandamus or certiorari,

82 Cal. Pen. Code, § 1235. This section was constructed to conform to the then existing provision of the constitution. Since its adoption the new constitution went into effect, and there has been no change in the code section to correspond.

83 65 Cal. 644, 4 Pac. 683, citing authorities from California and other states.

or we may frame and issue any other appropriate writ. But our power is not limited in the exercise of our appellate jurisdiction to the employment of technical writs. We may, by rule, establish any appropriate practice for the bringing here a record or proceeding in the court below. Still further, we possess the power as necessarily incident to our jurisdiction of recognizing as proper, any mode of procedure already adopted for bringing a cause before us. . . . . We are fully satisfied that we are empowered to make applicable to misdemeanors, prosecuted by indictment or information, the provisions of the Penal Code with reference to appeals in criminal actions amounting to felonies. We adopt the practice pursued in taking the present appeal, and will hereafter entertain appeals in criminal actions prosecuted by indictment or information amounting to misdemeanors only, from the judgments and orders mentioned in chapter 1, of title 9, of part 2, of the Penal Code, when the appeal is taken in the manner therein prescribed."

Under the constitution antedating that of 1879, the appellate jurisdiction was expressly limited to felony cases; and it was held that it was determined by the grade of which the defendant was convicted and not by that with which he was charged.[84]

84 People v. Apgar, 35 Cal. 389; People v. Aubrey, 53 Cal. 427.

CHAPTER 24.

SUBJECTS OF APPEAL—JUDGMENTS.

§ 479. General view—Statutory provisions.
§ 480. Rule that appeal lies only from final judgment—What constitutes.
§ 481. Policy of law in requiring final judgment for purposes of appeal.
§ 482. As to what constitutes finality for purposes of appeal—Interlocutory decrees distinguished.
§ 483. Appeal lies though further order pertaining to enforcement necessary.
§ 484. How finality affected by order granting new trial as to some, and denying it as to others.
§ 485. Whether entry essential to finality—Rendition and entry distinguished.
§ 486. Right of party with respect to entry of judgment.
§ 487. Essentials of judgment.
§ 488. Judgments distinguished from orders.
§ 489. Appeals lie from certain interlocutory decrees.
§ 490. Appeal lies from void judgment.
§ 491. Appeal lies from vague and informal judgment.
§ 492. Appeal lies from default judgment.
§ 493. Appeal lies from part of judgment.
§ 494. Judgments entered pursuant to mandate of appellate court not appealable.
§ 495. Rule that consent judgments not appealable—Exception.

§ 479. General view—Statutory provisions.

The most important among the subjects of appeal are final judgments.

The provision in the Code of Civil Procedure of California,[1] concerning appeals from final judgments of superior courts,

[1] Cal. Code Civ. Proc., § 963. Constitution, article 8, section 9, providing that "from all final judgments of the district court there

reads in part as follows: "An appeal may be taken to the supreme court, from a superior court, in the following cases: 1. From a final judgment entered in an action or special proceeding, commenced in a superior court, or brought into a superior court from another court." There has never been any amendment to this part of the section.

Actions and proceedings "can only be brought into the superior court" from justices' and police courts. But the part of the section referring to actions and proceedings brought into the superior court from other courts is limited, and must be read in connection with section 964, which reads as follows: "The foregoing section does not apply in cases appealed from justices', police, or other inferior courts, except cases of forcible entry, and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars." So it is seen that this section requires some explanation. Section 113 gives the justices' courts concurrent jurisdiction with the superior court: "1. In actions of forcible entry and detainer, where the rental value of the property entered upon, or unlawfully detained, does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars." In these cases, an appeal lies to the superior court. But in none of the other cases mentioned in section 964 is an appeal given, because of the provisions of section 838, which reads thus: "The parties to an action in a justices' court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, nor can any issue presenting such questions be tried by such court; and, if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of

shall be a right of appeal to the supreme court," excludes, by implication, a right of appeal from judgments other than final: North Point Consol. Irr. Co. v. Utah & S. L. Canal Co., 14 Utah, 155, 46 Pac. 824; Eastman v. Gurrey, 14 Utah, 169, 46 Pac. 828.

the pleadings are oral, a transcript of the same, from his docket to the clerk of the superior court of the county; and from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that, in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined." So, it is seen that actions and proceedings may be "brought into the superior court," otherwise than by appeal. The incongruity between section 964 and 838, was, no doubt, the result of amendments made to the former in 1880, without corresponding amendment being made to the latter. But, taking all the sections bearing on the subject together, the intention is so clear that no confusion has resulted.

Each state has its own statutory provisions designating the subjects of appeal; and, while there is a general similarity, there are many minor differences which it would require much useless labor and space to point out in detail.

It is a principle common to all jurisdictions that the character given to an action or proceeding by the form of the pleadings in the lower court cannot be changed on appeal. And it was held that, where a proceeding for the removal of a board of supervisors was in the form of a civil action, brought at the instance and in the name of a private individual, and the defendants were served with the summons required in a civil action, and the cause was conducted throughout as would be a civil trial, without a jury, a judgment of forfeiture of office rendered against the board in such action must be deemed rendered under civil process as respects the effect of an appeal therefrom; and the judgment could not be upheld as having been rendered in a criminal proceeding, regardless of whether the statute contemplates a civil or criminal proceeding, inasmuch as a criminal proceeding could only be conducted in the name and by the authority of the people of the state, and not by a private person.[2]

[2] Morton v. Broderick, 118 Cal. 474, 50 Pac. 644. See, also, Ponting v. Isaman (Idaho), 62 Pac. 680. An intervention setting up a

§ 480. Rule that appeal lies as a rule only from final judgment—What constitutes.

The first important matter to be determined is, What amounts to a "final determination of the rights of the parties in an action or proceeding"? Upon examination, it is found to have different senses according to the circumstances under which it is used, and the relation to the thing in mind of other things. A judgment may be final as to the court which rendered it, without being final as to the subject matter. "The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced in."[3] "Although a judgment may be final with reference to the court which pronounced it, and, as such, be the subject of an appeal, yet, it is not necessarily final with reference to the property, or rights affected, so long as it is subject to appeal and liable to be reversed. The 'final adjudication' intended by the parties to the covenant in question was, doubtless, an adjudication final as to the land and the rights of the parties. Had an appeal been taken, before this action was brought, unquestionably, the action could not have been maintained until after a final disposition of the appeal."[4]

§ 481. Policy of law in requiring final judgment for purposes of appeal.

It is the general policy of the law to disfavor numerous separate appeals in the same action or proceeding. The cause of justice is, as a rule, best promoted by postponing the right of appeal until all the matters litigated between the parties have been passed upon in the lower court, so that the whole case may be reviewed on one and the same appeal. Such general rule, or view of public policy existing, a party asserting that his case forms an exception to it, must clearly show that his claim comes

claim for equitable relief cannot change the original action from legal to equitable for purposes of appeal: United States v. Lesnet, 9 N. Mex. 271, 50 Pac. 321.

3 United States v. Schooner Peggy, 1 Cranch, 193.

4 Hills v. Sherwood, 33 Cal. 474, 478. See Thornton v. Mahoney, 24 Cal. 569.

within an exception created by some statute.[5] Pursuing this policy, the courts have not generally evinced a disposition to favor appeals not clearly provided for by statute.

§ 482. As to what constitutes finality for purposes of appeal—Interlocutory decrees distinguished.

The question of what amounts to a final judgment has often arisen to be passed upon by appellate courts. In determining the question and acquiring clear ideas on the subject, it is important to know what has been decided not to be a final judgment.

The line of distinction between what are known at the common law as interlocutory decrees and final decrees in equity cases is not always easy to draw, the former not being subjects of appeal under the California Code of Procedure and other similar systems, except where appeals are specifically provided for. An important, and, in fact, the only reliable test of the question whether an act of the court is its judgment or only an order is the answer to the inquiry whether it disposes of all the material issues raised by the pleadings between all the parties, so far as it is within the power of the court to dispose of them. And an ostensible judgment, which falls short of doing this, is merely an intermediate or interlocutory direction of the court, no matter how clearly it may indicate what the final judgment will be.[6] Accordingly, it was held that a recital in the record that

5 See Indianapolis etc. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 4 N. E. 721, 15 N. E. 824.

6 Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; Potter v. Talkington (Idaho), 49 Pac. 14; Simpson v. Kirchbaum, 43 Kan. 36, 22 Pac. 1018; Simpson v. Rothschild, 43 Kan. 33, 22 Pac. 1019; Sander etc. Co. v. Yesler's Estate, 2 Wash. 429, 27 Pac. 269. To same effect, Peck v. Vandenberg, 30 Cal. 11; Diggins v. Reay, 54 Cal. 526; Schultz v. McLean, 76 Cal. 608, 18 Pac. 775; Watkins v. Mason, 11 Or. 72, 4 Pac. 524; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494, where it was said that there must be a final judgment or the case can never come to an end. An order for judgment is not a final judgment from which an appeal will lie: Hodgins v. Harris, 4 Idaho, 517, 43 Pac. 72. Under Constitution, article 8, section 9, providing for appeals from judgments of the district courts, no appeal lies from an order overruling a motion to strike out a cost-bill, nor from an order overruling a motion to strike

"the court renders a decision on the motion to strike out the cross-complaint, and for judgment on the pleadings, heretofore urged and submitted herein, and sustains the same, except as to the cross-complaint, which is allowed to stand," did not show

a judgment from the files, such orders not being final judgments: Welsh v. Lambert, 18 Utah, 1, 54 Pac. 975. An intermediate judgment denying relief upon cross-complaint, purporting to dispose of only one of the defenses of the action, is irregular as a judgment and is not a final judgment from which an appeal can be taken, and an appeal therefrom before the rendition of final judgment in the action will be dismissed: Stockton etc. Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633. In Schultz v. McLean, supra, the court said: "No judgment has been entered or rendered either against or in favor of defendant Robinson. The cause is not then disposed of as to him. The court should have passed on the cause as to all the defendants." In Stockton etc. Works v. Ins. Co., supra, the court said: "The judgment or decree of December 19, 1890, denying to defendant the relief demanded in what is termed its cross-complaint, was not a final judgment, and the attempted separate appeal therefrom must be dismissed. There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy." See, also, Western Union Telegraph Co. v. Locke, 107 Ind. 9. Where it is positively alleged that a party defendant has an interest in the property against which enforcement of a street assessment is sought a judgment without bringing such party before the court is invalid accordingly, in Diggins v. Reay, supra, the court said: "The action was brought against Joseph W. Reay and Joseph Reay, who, with several other persons named as defendants, were alleged to have been at the time the assessment was made, and still continued to be when the action was commenced, the owners in fee of the lot of land assessed. It does not appear from the transcript which contains the judgment-roll, that Joseph Reay was ever served with summons, or appeared in the case in person, or by attorney. Neither does it appear from the record that any disposition of the case was made as to Joseph Reay. The judgment is against the other defendants. Joseph Reay's name is not mentioned in it. It is contended on behalf of the appellants that the judgment should be reversed, because the case has not been disposed of as to the person above mentioned. We think the point is well taken. Further, it is held in Hancock v. Bowman, 49 Cal. 413, which was an action to enforce a street assessment, that the statute gives no authority for a decree enforcing the lien, in the absence of one of the parties in interest. The statute under which the lien herein

a final judgment.[7] This test was also applied where, in an action to restrain foreclosure of a chattel mortgage, one intervened, asking for a money judgment against plaintiff, and that his chattel mortgage be declared superior to defendant's and be foreclosed, and his complaint was answered by defendant and demurred to by plaintiff. It was held that defendant could not appeal from a judgment for plaintiff against him, no disposition of the intervention having been made.[8] And it is immaterial that such order have the form of a judgment. This was well illustrated in the case of Broder v. Conklin.[9] Upon a trial of the action which was for an accounting, the judge, after the right of the plaintiff to an accounting from the defendant, had been established by the evidence, filed findings of fact and conclusions of law, in which he found "that the plaintiffs herein are entitled to judgment," and added as a closing direction "counsel will prepare an interlocutory judgment in favor of the plaintiffs, directing a reference to a commissioner to be appointed by the court to take an account between the parties." Upon this, and before further proceedings, the judge prepared, signed and delivered to the clerk, what purported to be a formal judgment in the case, which the clerk entered. Before further proceedings, the judge expired, and the defendant's counsel moved "to strike from the files, and to strike out and cancel and set aside" the aforesaid judgment upon the grounds that the trial of the cause had not been completed, and that, at the time the said document was filed, the term of office of the judge had expired. This motion was granted and the plaintiffs appealed.

is alleged to exist, is the same as to parties as that contrued in Hancock v. Bowman. Joseph Reay is alleged here to be one of the parties who owned the land on which the assessment was levied, and in accordance with the rule as declared in Hancock v. Bowman, he should have been served with summons, and brought before the court as a party."

7 Thiessen v. Riggs, 5 Idaho, 21, 46 Pac. 829.

8 Fairfield v. Binnian, 13 Wash, 1, 42 Pac. 632. Orders permitting parties to intervene, and refusing to strike out an answer as sham, are not final orders, and therefore are not appealable: Jones v. New York Life Ins. Co., 11 Utah, 401, 40 Pac. 702.

9 98 Cal. 360, 365, 33 Pac. 211.

In affirming the order granting the motion, the court said: "Aside from the fact that it is evident from the findings themselves, that it was not the opinion of the judge who tried the present case, that the trial was completed, a consideration of the character of the action will show that the clerk was neither authorized to enter the judgment which he did enter herein, nor to enter any judgment whatever upon the findings themselves at the time they were filed, or any time thereafter. The action is for the purpose of declaring that the defendant Conklin had been guilty of certain fraudulent acts in the matter of an insolvent's estate, and of declaring that he held certain property in trust for the benefit of the plaintiffs, and for an accounting of the moneys that had been received by him under such trust. Although the court found that the plaintiffs were entitled to judgment, there still remained many matters to be adjudicated by it before there could be a final determination of the rights of the parties. It was necessary to determine the principles upon which the accounting should be had, whether the property that had been conveyed to Conklin should be sold or not, and, if it was to be sold, whether the sale should be had before the accounting was taken, as well as the manner and terms of such sale; whether the same should be absolute when made by the referee, or should only become so after a confirmation by the court; whether the plaintiffs should have a direct money judgment against Conklin for the amount of their claims, or whether their recovery should be limited to the proceeds of the property received by him; whether those claims should bear interest, and, if so, at what rate, and whether, in the accounting which was to be given by Conklin, he should be charged interest upon the moneys he had received; whether the plaintiff, John Broder, was entitled to any judgment against Conklin, or was estopped therefrom. These and many other subjects involved in the action demanded judicial determination, and could not be determined by the clerk, and until they were so determined, the ministerial act of the clerk in entering the judgment did not arise."

It is not necessary, however, to the finality of a judgment, that it dispose of all the rights of the parties pertaining to the subject matter of the litigation. It is final if it dispose of such rights and interests as are involved in the action or proceeding

in which it is made, aside from the question of whether the same rights, or others not in issue, might be, or are even then being, litigated elsewhere. Accordingly, an appeal may be taken from a final judgment in an action to review a judgment or decree.[10]

Issues are often raised incidentally, or collaterally, to the main action, resulting in a final disposition of the matter at issue without reference to the judgment. Such directions of courts are sometimes designated as "orders," and sometimes as "judgments." They are, in reality, orders under the California system which permits of but one judgment in the same action or proceeding.[11] Many illustrations of such orders are to be found. Thus where, in an action by a judgment creditor against

10 Keeper v. Force, 86 Ind. 81.

11 See Fox v. Hale etc. Min. Co., 112 Cal. 568, 571, 44 Pac. 1022; Cal. Code Civ. Proc., § 1003, defining an order; post, § 496. And an order purporting to be a judgment but which leaves part of the issues undetermined is as amenable to the objection that it is not final as where it does not dispose of the interest of a party in the subject of the action. In the case above cited the court said: "The main contention of appellants, and the only point we find it necessary to notice, is that the judgment as entered was unauthorized by law or the directions of this court; that there can be but one final judgment in a case, and, as the judgment herein finally determines the rights of the parties as to one of the issues only, leaving and reserving others to be thereafter tried, it is premature and contrary to the course of law. That the judgment as entered is final in form and character as to the issue involved therein, no question is made. Nor is it controverted that the general rule in this state, as elsewhere, is that there can be but one final judgment in an ordinary civil action or proceeding." After distinguishing the case from certain exceptional cases the court proceeded thus: "It is, however, certain that the cases, if there are any, which can be taken out of the general rule above stated,—that but one judgment, final in effect if not in form, can be entered—must be altogether exceptional and dependent upon some special considerations. No such considerations have been brought to our attention in this case, nor were any such referred to in our former opinion. In construing our former judgment, therefor, the fair presumption is that no direction to enter a final judgment on some of the issues, in advance of the trial on the remaining issues, was intended." The powers of courts to enter orders in equity cases each finally determining some of the rights of the parties, should not be overlooked: See Thompson v. White, 63 Cal 505; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Trustees v. Greenough, 105 U. S. 527.

a railroad company and a mortgagee of its rolling stock, for the appointment of a receiver, certain laborers, as creditors of the company, intervened, and claimed to be entitled to preference, to which such mortgagee answered by setting up its mortgage, it was held that an order declaring that part of the claims held by such interveners were entitled to be paid before the body of the creditors, and directing a sale of the rolling-stock to provide funds for such purpose, was a final order, and appealable.[12] And it was held that an order fixing a trustee's com-

12 Radebaugh v. Tacoma etc. R. Co., 8 Wash. 570, 36 Pac. 460. Where relator's motion to dismiss a railroad's petition for intervention was denied by the district court, and exception taken by him, the question of the right of the railroad to intervene can be brought to the supreme court only in error, and not by questions reserved on relator's subsequently moving for judgment on the pleadings, though at the same time he moves to strike the petition in intervention and answer of the intervener: State v. Board of Commrs. of Sheridan Co., 7 Wyo. 161, 51 Pac. 204. But where a creditor of an insolvent corporation files a petition, praying that the receiver be required to treat the petitioner as a creditor of the corporation, an order denying the petition is appealable as a final order determining the rights of the parties: Rockwell v. Portland Sav. Bank, 35 Or. 303, 57 Pac. 903. And an order before judgment in an action to foreclose a mortgage of the property of a street railway company, making the indebtedness contracted by the receiver in another action a lien paramount and prior to the first mortgage and all other liens in litigation in the action, and directing their payment out of the proceeds of the sale, is reviewable upon appeal from the judgment of foreclosure and sale, and is not in its nature a final judgment nor an appealable order, and an appeal therefrom must be dismissed: Illinois Trust etc. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132. In Rockwell v. Sav. Bank, supra, the court said: "Recurring now to the motion to dismiss the appeal, we are impressed that the order dismissing the petition and denying the prayer for listing the claim of petitioner, so that it might participate in the dividends, is, in its nature, a final order, as it effectually and finally determines its rights to participate in any dividends of the insolvent bank, whether declared before or after the entry of the order, and precludes the possibility of proceeding further in the premises. This being so, the trust company ought not to be required to await the settlement of the receivership, when the funds have all been distributed before it could be permitted to prosecute the appeal." In Ill. Tr. & Sav. Bank v. Ry. Co., supra, Chief Justice Beatty, delivering the opinion, said: "It is conceded by counsel for appellants that, unless the order

pensation, made in a suit brought by him to determine the rights of creditors, was appealable, though no appeal was taken from the decision in the main case.[13] So, where the only matter before the court is that of the accounting of a receiver, a final order confirming and approving his final account is appealable.[14] On the same principle, a judgment declaring a trust and removing the trustee is a final order, from which an appeal will lie, notwithstanding that it directs the trustee to file an inventory and an account of all property received by him as trus-

appealed from is in effect a final judgment, the motion to dismiss must prevail upon both grounds. The only interlocutory or intermediate orders from which a separate appeal can be prosecuted are those enumerated in subdivision 3 of section 939 of the Code of Civil Procedure, and this order is not included in that enumeration. All other intermediate orders involving the merits or necessarily affecting the judgment are reviewable only on appeal from the judgment itself. . . . . In Rochat v. Gee, 91 Cal. 355, 27 Pac. 670, we held that there could be no separate appeal from such order when entered before final judgment. And so in this case there can be no separate appeal unless the order in question is essentially different from the order made in Rochat v. Gee. It is true that this order is unusual, and in some respects peculiar, but as it affects, Alvord and Brown, it is in nowise different from an ordinary settlement of a receiver's account. The fact that it allows certain claims against the receiver in advance of payment instead of approving them after payment—the more usual course—can make no difference. The merits of such claims can be reviewed on appeal from the judgment, and if their allowance is disproved the effect will be the same as if they had been first paid and afterward approved, in the settlement of the receiver's account.''

13 Anderson v. Matthews, 8 Wyo. 307, 57 Pac. 156.

14 Chandler v. Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548. A receiver may appeal from an order of the court directing him to pay over money in his hands into the court, when such order erroneously fixes the amount of the property in his hands, and directs him to turn over more than he has in his custody: Merriam v. Victory Min. Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997. Compare Rochat v. Gee, 91 Cal. 355, 27 Pac. 670, holding that an order of trial court approving account of receiver appointed in an action for the dissolution of a copartnership, and for an accounting which was made before final judgment therein and which shows on its face that the account was not final, and that the receiver is to continue in possession of the assets of the firm, and to act on its behalf under orders of the court, is not appealable.

tee.[15] And a decree allowing compensation to a master and his attorney, and, in default of payment being made, ordering the sale of property, thereby creating a fund out of which they are to be paid, is a final judgment or decision, from which an appeal lies.[16]

An order appointing a receiver is a final judgment within the meaning of the Utah constitution,[17] and is therefore ap-

15 Bryant v. Davis, 22 Mont. 534, 57 Pac. 143. In this case the court, per Justice Hunt, said: "Respondent finally says that the judgment is not a final judgment from which an appeal lies under section 1722 of the Code of Civil Procedure. This argument rests upon the fact that the court in its judgment, after declaring Davis, a trustee and ordering him removed, and that he be devested of title to the property held by him as a trustee, ordered him to file an inventory of property and statement of all money received by him as trustee under the sale made by him. But in adjudging Davis to be a trustee under the agreement alleged in the complaint, and in summarily removing him from the position of trust, and devesting him of title to the trust property, the court did finally determine the rights of the parties, leaving nothing at all for Davis to do, except within ten days to 'make a full, true and perfect inventory, under oath, of all property of every name and nature acquired by him at the execution sale aforesaid, together with a statement of any and all moneys that came into his hands under, by, or through the sale aforesaid, ... and file the same . . . . with the clerk of this court,' and turn over all property and money held by him as trustee to Emmett Callahan, who was appointed Davis' successor in the same decree of the court. This branch of the case is disposed of by the decision in Arnold v. Sinclair, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340, where it was determined that, if after a decree in equity had been entered no further questions could come before the court except such as are necessary for carrying the decree into effect, it is final, within the meaning of the code: Code Civ. Proc., §§ 1000, 1722. Without fully approving of that doctrine, which has been distinctly repudiated by the United States supreme court in Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. Rep. 201, decided since Arnold v. Sinclair, we yet recognize that it has the support of many cases, and hold that in this instance it ought not to be departed from."

16 Nether v. Crawrord (N. Mex.), 65 Pac. 156. See Curtis v. Richards, 4 Idaho, 434, 40 Pac. 57, that holding that a motion to change attorneys in a pending suit is a special proceeding, from a judgment in which an appeal lies.

17 Ogden City v. Bear Lake & River Waterworks etc. Co., 16 Utah, 440, 52 Pac. 697.

pealable.[18] In California, it is one of the appealable orders designated in the code,[19] and an order requiring payment of receiver's compensation and other expenses out of funds in receiver's hands is a final order, from which an appeal lies.[20]

18 See Cal. Code Civ. Proc., § 963, subd. 2. See post, §§ 496-510, as to appealable orders generally.

19 Cal. Code Civ. Proc., § 963.

20 Ogden City v. Bear Lake & River Waterworks etc. Co., 18 Utah, 279, 55 Pac. 385. An order fixing the compensation of a receiver, and taxing it as costs in the action as against all the parties, and directing him to apply toward its payment the balance of fund remaining in his hands as such receiver, is, in legal effect, a final judgment upon a collateral matter arising out of the action, and is appealable by any party interested in the fund: Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71, 47 Pac. 872. An order settling the accounts of a receiver, and directing the payment of his compensation by one of the parties, although made before there has been a final judgment in the action in which he was appointed, is a final determination of the rights of the parties to the matter then before the court, and an appeal therefrom, as from a final judgment, may be taken within six months after its entry: City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 Pac. 198. In Grant v. Los Angeles etc. Ry. Co., supra, the court said: "As to the order fixing the receivers' compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment it is nevertheless an adjudication from which an appeal will lie. The order not only fixes the compensation of the receiver, but taxes such compensation as costs in the action, as against all the parties, and directs and authories the receiver to apply toward its payment the balance of a fund remaining in his hands as such receiver. Such an order, however, it may be designated, is, in legal effect, 'a final judgment upon a collateral matter arising out of the action,' and is 'appealable by any party interested in the fund': Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, and cases there cited. The appellant has such an interest." In the last case cited above, the question was discussed upon a motion to dismiss the appeal, the court saying: "The right to have this motion granted depends upon the character of the order—Whether it is of such a nature as requires an appeal therefrom to be taken within sixty days after it was filed or entered in the minutes of the court, or whether it is a final judgment, from which an appeal may be taken within six months after its entry. The orders of the superior court from which an appeal may be taken to this court are designated in subdivision 2, of section 963 of the Code of Civil Procedure, and the time within which the

An appeal will also lie, as from a final judgment in a special proceeding, under the constitutional and statutory provisions of Idaho, where the district court has confirmed a receiver's

right of appeal from these orders may be exercised is given in section 939 of the Code of Civil Procedure. Certain orders in matters of probate of which this court has appellate jurisdiction are also enumerated in subdivision 3, section 939, and the time for an appeal therefrom is given in section 1715 of the Code of Civil Procedure. The order from which the present appeal is taken is not one of the orders before judgment mentioned in subdivision 2, of section 963 of the Code of Civil Procedure, nor is it a special order made after judgment, since, at the time it was made, no judgment had been rendered in the action; nor is it one of the interlocutory orders or decrees therein named. The right to appeal therefrom does not rest upon any provision in this subdivision of the section. That any party aggrieved by such order may appeal to this court therefrom is, however, well settled: Estate of Welch, 106 Cal. 427, 39 Pac. 805. In Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, this court refused to prohibit the superior court from making an order fixing the compensation of a receiver, giving as a reason therefor that if the court should order it to be paid out of the fund in the receiver's hands, 'such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund,' and that as an appeal could be taken from such order, a writ of prohibition would not lie. This was a clear declaration that the order was appealable, although the time within which the appeal may be taken was not then before the court. In Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. Rep. 136, an appeal had been taken from a decree confirming the account of a receiver, and in discussing the right to appeal therefrom that court said that the proceedings in reference to the account were 'a side issue in the case, in which the complainants on the one side and the receiver on the other were the real and interested parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants, and in favor of the receiver. The receiver, though not a party in the principle suit, was an officer of the court, appointed in the suit, and was a principle party to the particular question raised by the proceedings referred to'—and refused to dismiss the appeal.'' The court distinguished the case before it from other cases noticed in a preceding note, in the following language: ''The question here presented differs from that presented in Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; and in Illinois Trust etc. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132, in that the orders appealed from in those cases were for the settlement of a receiver's account, which had

sale.[21] Substitution of attorneys was held in Utah to constitute a judgment from which an appeal could be taken.[22]

In California, an application for alimony, though not a separate suit, is a proceeding for separate judgment, independent of the final judgment in the case, and is appealable. In order to due process of law in obtaining the separate judgment for alimony, there must be a hearing or an opportunity to be heard.[23] But it is held otherwise in Utah.[24]

In all such cases, the matter so arising is not within the express issues, but is within their general scope.

been passed by the court while he was in the exercise of his office, and did not finally determine the rights of the appellants therefrom. The order appealed from in Illinois Trust etc. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132, merely declared the priority of a lien to the one held by the appellants, and it was held that as this ruling could be reviewed on an appeal from the final decree, the appellants were not aggrieved thereby. In neither of the cases did the order appealed from direct the payment of any money or the performance of any act by or against the appellant, and, as was said in Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, 'it lacked one essential element of a final judgment.'' In Trustees v. Greenough, 105 U. S. 527, it was held that although that court could entertain an appeal only from a final decree, yet a decree for the payment to the complainant, out of the trust fund under the control of the court, of the costs and expenses incurred by him for the benefit of the fund, was so far independent of the suit itself as to make the order substantially a final decree for the purpose of an appeal, although there had been no final decree in the suit; saying of the orders: ''They are certainly a final determination of the particular matter arising upon the complainants' petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Although incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.''

21 First Nat. Bank v. C. Bunting & Co. (Idaho), 63 Pac. 694.

22 Sandberg v. Victor Gold etc. Min. Co., 18 Utah, 66, 55 Pac. 74.

23 Baker v. Baker, 136 Cal. 302, 68 Pac. 971. In this case the court said: ''The application for alimony, though it cannot be considered as a separate suit, is a proceeding for separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment from which an appeal may be taken: Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Hite v. Hite, 124 Cal. 389,'' 71 Am. St. Rep. 82, 57 Pac. 227.

24 In re Kelsey, 12 Utah, 393, 43 Pac. 106.

A general test for the determination of the question whether a judgment has been rendered or only an interlocutory order made in actions where a judgment for money is sought may be found by asking whether what is done settles the amount of recovery.[25] On the other hand, it was held in an action for an injunction and for damages, that a judgment for defendant af-

[25] See Hunter v. Hunter, 100 Ill. 519; Burlington etc. Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. Rep. 58. Not final order vacating judgment and allowing parties to defend· McCulloch v. Dodge, 8 Kan. 476; In re Studdart, 30 Minn. 553, 16 N. W. 452; Owen v. Going, 7 Colo. 85, 1 Pac. 229. Order that bill be taken pro confesso: Russell v. Lathrop, 122 Mass. 300; Order disposing of case as to same only of issues and parties: Lilienterne v. Lewis (Tex.), 12 S. W. 750. The powers of courts herein and the proper construction of the relevant code provisions were explained by Justice Ross in Thompson v. White, 63 Cal. 505, as follows: "In this there was error. It is not necessary to consider whether under the former constitution, which gives to the district courts existing under its jurisdiction, and under the present constitution, which gives to the superior courts existing under its jurisdiction, 'of cases in equity,' it lay in the power of the legislature to deprive such courts of so essential a means for the proper distribution of cases in equity as the interlocutory decree; for it is a mistake to say the legislature has attempted to do any thing of the kind. On the contrary, by section 187 of the Code of Civil Procedure, it is expressly declared that 'when jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given, and in the exercise of this jurisdiction, if the course of proceedings be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code,' the object of which is declared by a preceding section to be the promotion of justice. We see nothing in conflict with this in the fact that section 577 of the same code defines a judgment to be 'the final determination of the rights of the parties in an action or proceeding,' and that, by section 1003, it is declared that, 'every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order.' There is no magic in a name. An interlocutory decision of a court of equity, in an equity case, is as efficacious when called an order as when called a judgment or decree. Whether it be called an interlocutory decree or a decretal order, or simply an order, it is in substance the same. Sections 577 and 1003 of our code were taken substantially from the New York Code of Procedure, and the codifiers of that state thus explained their purpose in employing the

ter a hearing on the injunction was a final judgment, from which an appeal would lie because it disposed of the entire case as to plaintiff, his claim for damages resting on the tort he was seeking to enjoin.[26]

From the foregoing decisions, it will be seen that the statutory provisions and views of courts are divergent, and that it is necessary to study the statutes and decisions of each particu-

phraseology they did: 'To avoid the confusion incident to the use of the word 'judgment.' In two senses, one as interlocutory and the other as final, we have thought it better to use it only in the latter sense, and to designate all other written directions of a court or judge as orders': Report of Commissioners to Legislature, February, 1848, 182. But, in the purpose thus expressed, no intent is perceived to abolish the power of a court of equity to pronounce, what in equity practice was called, an interlocutory decree or decretal order, but only a provision to the effect that that which finally determined the rights of the parties should be called a judgment, and that every other direction of a court or judge made or entered in writing, should be denominated an order. In New York the legislature has returned to the phrase 'interlocutory judgment' in place of 'order,' therefore used in the code (Bliss' Annotated Code, § 1200); but even while the designation was different, we think the substance of the thing was all the time the same. And so here. We find in section 577 and 1003, no prohibition of such intermediate determinations by the court as the exigencies of the case may demand, and no conflict between them and section 187, which as has been seen, in terms provided that, in the exercise of the jurisdiction conferred by the constitution or any statute or any court or judicial officer, if the course of procedure be not specifically pointed out by the code or statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the promotion of justice. Besides, the Code of Procedure makes express recognition of the interlocutory order or decision—section 647 providing, among other things, that 'an interlocutory order or decision, finally determining the rights of the parties, or some of them,' shall be deemed to have been excepted to. And in the reports of the state are to be found numerous cases recognizing the power of the court to make such interlocutory determinations. A very late case is that of Hinds v. Gage, 56 Cal. 486. See, also, Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393; Packard v. Bird, 40 Cal. 380; Jones v. Clark, 42 Cal. 180; McFadden v. McFadden, 44 Cal. 306; Gray v. Palmer, 9 Cal. 635.''

[26] North Point Consol. Irr. Co. v. Utah etc. Canal Co., 23 Utah, 199, 63 Pac. 812.

lar state, in order to ascertain what orders are final and what interlocutory orders are appealable.

Of course, an interlocutory order may be finally embodied in the decree, and thus become an essential part of it, but, unless this is done, it constitutes no part of it, so as to warrant an appeal, unless expressly made appealable by statute.[27] Accordingly, it was held that an order in a foreclosure suit under a trust deed decreeing that said deed shall take priority over certain mechanics' liens was interlocutory, and not appealable.[28]

Until embodied in the final decree, an order has no element of finality, inasmuch as the court may change its orders, notwithstanding that it may have clearly manifested an invitation to adhere to them and make them the basis of a final judgment or decree. Accordingly, a denial of a motion for final judgment on a special verdict, or on the answers of a jury to special interrogatories was held not to be a final judgment.[29] So, an order sustaining a demurrer to the complaint, reciting that plaintiff declined to amend and directing judgment for costs for defendant, was held not final so as to authorize an appeal.[30] But the authorities herein are not uniform, being governed to some extent by the peculiarities of statutes of the respective states. It was held, in an Oregon case, where a bill of discovery was filed for the sole purpose of obtaining defendant's answers to several interrogatories in aid of a contemplated action at law, that an order overruling a demurrer to the bill was

27 See Farmers' Loan etc. Co. v. Canada etc. R. R. Co., 127 Ind. 250, 26 N. E. 784. But where the fixing of attorneys' fees is reserved in the interlocutory decree for future consideration, and is passed upon at the time of confirming the sale, such order may be treated as a final judgment as to the attorneys' fees: Holt v. Holt, 131 Cal. 610, 63 Pac. 912.

28 Bucher v. Thompson, 7 N. Mex. 599, 38 Pac. 250.

29 Murray v. Scribner, 70 Wis. 228, 35 N. W. 311.

30 Butte etc. Min. Co. v. Montana etc. Co. (Mont.), 69 Pac. 714. An order overruling a demurrer is a part of the judgment-roll, under Compiled Laws of 1888, section 3413, subdivision 2, and may be reviewed on an appeal from the judgment: Thomas v. Glendinning, 13 Utah, 47, 44 Pac. 652.

a final order determining the rights of the parties.[31] The authorities all agree, however, that an appeal lies from the judgment entered on a demurrer upon which a party elects to stand.[32]

As a rule, an order granting a nonsuit is not appealable, the proper practice being to await the entry of judgment before appealing.[33] And in the state of Washington it was held that a judgment of nonsuit and an order setting the same aside should not be deemed so far determinative of the rights of the parties as to warrant appeals therefrom.[34] It depends somewhat upon the form of the order. And it was held that an order granting a motion for a nonsuit at the close of plaintiff's tes-

31 State v. Security Savings etc. Co., 28 Or. 410, 43 Pac. 162.

32 See Willis v. Marks, 29 Or. 493, 45 Pac. 293. In this case Justice Wolverton delivering the opinion said: "A demurrer is an answer, in so far as it questions the law of the case upon the facts stated. An answer challenges the facts themselves, and, within the purview of the statute, the demurrer is as effective in giving the right of appeal as an answer. So that the judgment of the county court was one from which an appeal was taken." See, also, Kearns v. Follansby, 15 Or. 596, 16 Pac. 478, where Justice Strahan, delivering the opinion, said: "It is the constant practice, and has been since the adoption of the code, to appeal to this court from the ruling of the lower court on a demurrer. And it has never been suggested here that such a judgment was given for want of an answer."

33 See Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Havens v. Stewart (Idaho), 62 Pac. 682, holding that an order striking plaintiff's complaint from the files is not such a final disposition of the case as to be appealable; but that it was the duty of the court to order a formal judgment dismissing the action, so plaintiff might avail himself of his right to appeal. In the first case above, the court said: "Of course, there is nothing in respondent's contention that the action of the court in granting the motion for a nonsuit cannot be reviewed on an appeal from an order denying a new trial. Granting the motion for a nonsuit was an error of law occurring at the trial, and was excepted to and specified as such, as appears by appellant's bill of exceptions used on the motion for a new trial: Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146. Besides, we also have before us an appeal from the judgment based on the order of nonsuit: Code Civ. Proc., § 956."

34 See Hart (J. F.) Lumber Co. v. Rucker, 17 Wash. 600, 50 Pac. 484. But see Lawrence v. Mead, 6 S. Dak. 528, 6 N. W. 131, holding that appeal lies from order dismissing a complaint with costs. In

timony, "upon due consideration thereof," whereby "the cause is ordered dismissed and the jury herein duly discharged," was appealable.[35] And an order as entered in the judgment-book by which it was "ordered and adjudged that the plaintiff's action be and the same is hereby, dismissed, and that plaintiff be, and she is hereby, barred from all equity of redemption or other right to the property, set forth and described," in a certain conditional judgment previously entered in the same action, was appealable.[36]

Lumber Co. v. Rucker, supra, the court said: "Plaintiff moves to dismiss the appeal on the ground that it is not authorized by statute. The defendant insists that it is an appeal from an order granting a new trial; plaintiff, that the order merely vacated a judgment of nonsuit or dismissal obtained against plaintiff through mistake, inadvertence, surprise and excusable neglect. Is the order one granting a new trial? Was there a trial? 'A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact': Laws 1893, p. 416; 2 Hill's Code, § 334. 'An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.' 'An issue of fact arises on a material allegation in the complaint controverted by the answer, or upon new matter or a setoff controverted by the answer, or upon new matter in the reply.' An issue of neither law nor fact was heard in the superior court when the order or judgment of dismissal was made, and while the court directed the jury to return a verdict for the defendant, it is evident that there was no issue which could be submitted to the jury. Section 409 of 2 Hill's Code, subdivision 3, authorizes the court to dismiss the action when the plaintiff fails to appear on trial and the defendant asks for a dismissal. The superior court did nothing more in the case than enter a judgment of nonsuit or dismissal. Such judgment was not a bar to another action for the same cause. The direction to the jury to ret rn a verdict for the defendant was of no further effect than the action of the court. The subsequent setting aside of the judgment was not the granting of a new trial, because a new trial is defined in section 399 of 2 Hill's Code as re-examination of an issue in the same court after a trial and decision by a jury, court or referee.' We do not think an appeal lies from the order before us, and the appeal is dismissed."

35 De Graf v. Seattle etc. Nav. Co., 10 Wash. 468, 38 Pac. 1006; See, also, Van Horne v. Watrous, 10 Wash. 525, 39 Pac. 136; Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207. These cases are in conflict with later cases in both the states, cited in preceding notes.

36 Byrne v. Hudson, 127 Cal. 254, 59 Pac. 597. This was treated as a final judgment of nonsuit, as appears from the following con-

It is scarcely necessary to say that the question of appealability is not in any degree affected by the character or purpose of the litigation. For instance, a judgment of a district court refusing a writ of review against a justice's court is appealable.[37]

The term "final judgment" as used in the first subdivision of section 963 of the California Code of Civil Procedure means only those judgments known at common law as final judgments, which put an end to an action or special proceeding, and does not apply to the statutory determinations termed "orders or judgments" defined in the third subdivision of such section, which includes all appealable judgments and orders made in probate proceedings.[38]

cluding language of the opinion: "We also think that the order of October 6th, entered on that day in the judgment-book by which it was 'ordered and adjudged that the plaintiff's action be, and the same is hereby dismissed, and that plaintiff be, and she hereby is barred from all equity of redemption or other right to the property set forth and described in said judgment,' was and is as against appellant a final judgment, and that she had six months from its date in which to appeal therefrom. The motion to dismiss the appeal is denied."

[37] State v. Lenahan, 17 Mont. 518, 43 Pac. 712. Held that the decision of the district court, refusing a writ of prohibition to a justice's judgment, is final, where the constitutionality or invalidity of a statute is not involved under Const., art. 8, sec. 9; Overland Gold Min. Co. v. McMaster, 19 Utah, 177, 56 Pac. 977.

[38] Estate of Smith, 98 Cal. 636, 33 Pac. 744. The court in reaching the conclusion found in the text in this case reviewed various statutory provisions and numerous authorities. In Estate of Callahan Co., 60 Cal. 232, the order appealed from was one vacating a decree of distribution and settlement of the final account of the executor. The supreme court in determining whether or not the order was appealable held that the orders in probate proceedings from which an appeal would be, were only those enumerated in the third subdivision of section 963 of the Code of Civil Procedure, and in referring to the provision in subdivision 2 of the section which gives an appeal from "a special order made after final judgment," said: "But we think that the final judgment there referred to is the one mentioned in subdivision 1, viz., a final judgment in an action or special proceeding commenced in a superior court, or brought into a superior court from another court. It seems to us quite clear that the appeal-

§ 483. Appeal lies though further order pertaining to enforcement necessary.

It is not essential to the finality of a judgment that no further order is required to give a party its full benefit. The fact that a further order for its enforcement is necessary will not defeat the right of appeal. If the judgment stand the test of inquiry as to whether it disposes of the merits of the action, and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective, does not affect its finality, for the purposes of an appeal, at any rate.[39]

able judgments and orders made in probate proceedings are all enumerated in subdivision 3, and as this order is not therein mentioned, it is not an appealable order." In re Walkerly, 94 Cal. 352, Justice McFarland, delivering the opinion of the court, said: "The general rule is well established that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in subdivision 3 of section 963 of the Code of Civil Procedure. . . . . And that the order here appealed from is not a 'special order made after final judgment,' within the meaning of the second subdivision of said section 963, is also settled by the authorities first above cited: Estate of Dean, 62 Cal. 613; In re Moore, 86 Cal. 58, 24 Pac. 816; In re Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Calahan, 60 Cal. 232. If it were otherwise, the third subdivision of said section could be entirely disregarded by simply assuming that a probate order not therein mentioned, was a final judgment, and that an order refusing to vacate it was a 'special order made after final judgment." In re Bauquier, 88 Cal. 302, 26 Pac. 172, 532, the court held that, "the provision in subdivision 2 of section 963 of the Code of Civil Procedure, which authorizes an appeal to be taken to the supreme court 'from an order granting or refusing a new trial,' embraces all such orders, whether made in probate proceedings or in civil actions." Attention was paid to the same subject in the earlier decisions of the court. In Loring v. Illsley, 1 Cal. 27, in discussing the distinction between an order and a final judgment, said: "The former [an order] is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the proceedings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect." See, also, Gilman v. Contra Costa Co., 8 Cal. 57, 68 Am. Dec. 290, and note.

39 See Fleenor v. Driskill, 97 Ind. 27.

§ 484. How finality affected by order granting new trial as to some and denying it as to others.

The general effect of orders on motions for new trial has been previously explained, and it was shown that an order setting aside the judgment and granting a new trial cut off the right of appeal except that of the party recovering the judgment from the order granting the motion.[40] But it has been also shown that a new trial might be granted as to one or more parties and denied as to others.[41] In such case, the findings are set aside which determine the rights of such parties, and as to them the case stands as if it had never been tried; but the judgment and findings, in so far as they purport to determine the rights of the moving parties, and those as to whom the new trial has been denied, continue to exist, and the judgment is appealable.[42]

§ 485. Whether entry essential to finality—Rendition and entry distinguished.

The only sense in which the finality of a judgment is of any present importance has reference to the stage in the action or proceeding at which the time begins to run for the purposes of appeal. The definition of a judgment given in the code, though perhaps all that so general a subject permitted, falls far short of a solution of the question.

In discussing and arriving at conclusions as to what are judgments, the question as to the point or date at which it becomes final is necessarily involved; and though that would, with technical propriety, be reserved for a future purpose, it will be discussed here with a view to completeness.

The question has almost invariably arisen in connection with, or for the purpose of determining, the point at which time began to run for taking other steps in the action. Sometimes the rendition, and in other instances, the entry, of the judgment marks the beginning of the period for other steps or proceedings. There have been, in California, changes in statutes

[40] Ante, §§ 14, 417, 418.

[41] Ante, § 395.

[42] Wittenbrock v. Bellmer, 62 Cal. 558.

of which notice had to be taken by the courts in determining the question.

For the purposes of the proceeding for a new trial, as has been shown, the question of finality is to be determined primarily by the party who recovers the judgment, since the party seeking a new trial need not move until the judgment has been entered and he has had notice of its entry.[43] But, for the purposes of an appeal, except where an exception as to the sufficiency of evidence is sought to be reviewed, there is no judgment until it is entered by the clerk, within the terms of the Code of Civil Procedure as repeatedly decided by the supreme court.

To obtain a comprehensive and thorough understanding of the decisions, and to be able to distinguish earlier decisions, no longer applicable, it will be necessary to point out the statutory changes, as well as the construction given the statutes before and after such changes. Prior to 1866, the provision of the Practice Act,[44] relating to appeals from final judgments of the district courts, provided for appeals from judgments "rendered" in such courts. In 1866, the legislature substituted the word "entered" for "rendered," and the section was embodied in the Code of Civil Procedure as thus amended, and has not since been changed. In 1880, after the adoption of the new constitution of 1879, creating superior courts to supersede district courts, the legislature changed the form of the sections somewhat, in order to conform to the constitutional change, but made no change in its substance. While under the statutes, appeals had to be taken within a given time after the rendition of the judgment, it was often important to know what amounted to the rendering of judgment; and it is still important in all cases where a review is sought of an exception taken to a decision or verdict on the ground that it is not supported by the evidence, and a question is raised to such review on the ground that the appeal was not taken within sixty days after rendition of judgment. The Code of Civil Procedure,[45] fixing the periods within which appeals may be taken, uses both the term

43 See ante, §§ 360-362.

44 § 347.

45 Cal. Code Civ. Proc., § 939.

"entry" and "rendition" in connection with the different appeals. This can be soonest and most clearly shown by quoting it in part: "An appeal may be taken: 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

Before considering the effect of the differing phraseology with respect to appeals from judgments generally and appeals to secure a review of an exception for insufficiency of evidence an attempt will be made to settle the respective meanings of the terms "rendition" and "entry."

A court renders judgment by declaring or announcing its decision in open court. But the code has prescribed forms and methods to be observed and conformed to in the decision of the issues in actions and has thus defined what legally constitutes a rendition of judgment. If findings are waived the announcement of its decision by the court and the entry thereof in the minutes of the court constitutes the rendition of judgment; but without such waiver of findings, there is no decision, and consequently no rendition of judgment until findings have been filed. Where a case is tried by a jury and a general verdict is returned, there is nothing further for the court to do. The clerk enters the verdict, and the judgment pursuant to the verdict; and the return of such general verdict, and its entry in the minutes may be regarded as the rendition of judgment. It is otherwise where the verdict is special, that is upon special issues of fact submitted to the jury. In that case the duty devolves upon the court to announce, that is, render, judgment upon the verdict. There is this difference between a general and a special verdict: the former includes or rather unmistakably implies the conclusion of law constituting the judgment while the latter answers the purpose of findings by the court but lacks the conclusion of law which accompanies findings made by the court. Therefore in cases of special verdicts the clerk has no guide for entering the judgment until the court

has declared the conclusion of law—that is, directed what judgment shall be entered. It is probably otherwise where all the issues are submitted to the jury in the form of interrogatories to be answered by them and all are answered by them, in proper form, in an action at law. The answers have, in such case, the combined effect of a general verdict. And probably in such instance a judgment would be held to have been rendered without action by the court, upon the return and entry in the minutes of such a verdict. But it would appear useless to submit special interrogatories to a jury covering all the issues, in a law case, it being so much more convenient and satisfactory to submit all the issues at once, requiring a general verdict.

Little need be said as to what is meant by the entry of judgment. The duty of entering all judgments devolves upon the clerk; and there is no judgment for any practical purpose until this duty is performed. There can be, as has been repeatedly decided, no appeal from a judgment, prior to its formal entry in the judgment book prescribed by law. Therefore the California judicial system presents this anomalous condition, that a party may be deprived of a review, on appeal from the judgment of the evidence with reference to its sufficiency by the failure of the clerk to enter the judgment or of the successful party to have it entered within sixty days after its rendition. But the courts appear to have gone too far in saying that the party is without remedy in such case. He may himself prepare a judgment though in favor of the opposite party, and present it to the court and request that the clerk be ordered to enter it; and if the court refuses, since it is the duty of the clerk to enter judgment, and since the judgment, no matter what its scope and character, does not require the judge's signature, he may present it to the clerk and request its entry, and if the clerk refuses, a writ of mandate will lie to compel him to enter it. It is immaterial who prepares the draft, provided it be in proper form. The writ would probably lie, whether any draft were presented to the clerk or not.

The same result followed under the Practice Act prior to its amendment in 1866, with reference to appeals from judgments generally. During that period numerous appeals taken after the expiration of one year from the rendition of judgment, but

within less than a year after entry of judgment were dismissed. There are intentions in some of the opinions of the court to the effect that an appeal might be taken after the rendition and before the entry of judgment; but it is obvious that there could be no appeal without a judgment-roll, and the judgment-roll is not made up until the entry of judgment.[46] Nevertheless the rule made by the Practice Act, that the appeal must be taken within a year from the rendition of the judgment, was strictly enforced. In Gray v. Palmer[47] the distinction between the rendition and the entry of judgment was very carefully and clearly pointed out, and an appeal taken more than a year after rendition but within a year from entry of the judgment, dismissed. The court refers to, quotes and compares several sections of the Practice Act. The decision is instructive to those seeking definite and correct information on the force and effect of that which constitutes a judgment at dif-

[46] Cal. Code Civ. Proc., § 670. Statutes in Wyoming provide that the district court shall be open at all times for the entry of judgments, and that judgments so entered shall be of the same force as judgment entered at the term. Held, that, since the statute in effect makes a judgment entered in vacation a judgment of the court, it is a judgment from which an appeal may be taken, under constitutional article 5, sections 2, 18, giving the supreme court jurisdiction over the judgments of inferior "courts": Anderson v. Matthews, 8 Wyo. 307, 57 Pac. 156; Laws 1895, c. 21, §§ 1, 2.

[47] 28 Cal. 416. This case was cited and approved as to its definitions of the rendition of judgment in Harris v. Railroad Co., 41 Cal. 407, and subsequent cases. In Young v. Wright, 52 Cal. 407, 410, the court adopted the definition of "rendered," and distinguished between a judgment "rendered" and one "made or given," holding the latter to signify a judgment which has been duly entered: See on same general subject of existence, validity and force and effect of judgments after rendition but before entry, for purposes of appeal and other purposes, and as to what constitutes rendition and entry: In re Newman, 75 Cal. 221, 7 Am. St. Rep. 151, 16 Pac. 887; In re Cook, 77 Cal. 224, 11 Am. St. Rep. 270, 17 Pac. 923, 19 Pac. 431; Schurtz v. Romer, 81 Cal. 247, 22 Pac. 657; Marshall v. Taylor, 97 Cal. 426, 32 Pac. 515; Crim v. Kessing, 89 Cal. 488; 23 Am. St. Rep. 497, 26 Pac. 1074; Durant v. Comegys, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755; Harmon v. Comstock etc. Cattle Co., 9 Mont. 248, 23 Pac. 470; State v. Biesman, 12 Mont. 16, 29 Pac. 534; Ponott v. Kane, 14 Mont. 27, 35 Pac. 243; Schuster v. Rader, 13 Colo. 334, 22 Pac. 505; Mayer v. Haggerty, 138 Ind. 631, 38 N. E. 42.

ferent stages of an action subsequent to a verdict or decision. But in that case the court expressed the idea that a judgment was not rendered until it was drawn up in proper form and signed by the judge and filed with the clerk—an idea which has been since exploded in so far as it treated the signature of the judge essential.[48] Neither in the case of judgments nor what were formerly in fact, and are still often termed decrees in equity, is the signature of the judge considered necessary, notwithstanding the convenient practice of having the attorney in whose favor the judgment was rendered prepare it and present it to the judge for signature. It was held in Clink v. Thurston[49] that the code makes no distinction in this respect between judgments and decrees both deriving their existence and validity from the same provision of the code. Although the word "decree" is often used in statutes, by the courts and counsel, it is never used in a sense different from that in which the term "judgment" is used, except that it signifies a judgment of a particular character.[50]

That no appeal can be taken from a judgment until it is entered is, as before stated, well settled. In McLaughlin v. Doherty[51] the court, after discussing distinctions between rendition

48 Crim v. Kessing, 89 Cal. 489, 23 Am. St. Rep. 491, 26 Pac. 1074; Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. In the second case the court said: "The signature of the judge is not necessary to the validity of the judgment (Crim v. Kessing, 89 Cal. 489, 23 Am. St. Rep. 491, 26 Pac. 1074), but it is of service in determining what has been adjudged; and in its absence there must be something of record, as, for example, the minutes of the court, or the conclusions of law stated in the findings, by which the clerk can be guided in the performance of his ministerial duties, and from which the actual judgment of the court can be ascertained, and by which it can also be determined whether the clerk while acting in a ministerial capacity has correctly entered such judgment."

49 47 Cal. 29. See, also, In re Cook, 77 Cal. 227, 11 Am. St. Rep. 267, 17 Pac. 923; 19 Pac. 431, holding signature of judge gives "no additional solemnity or validity."

50 McGonahan v. Maxwell, 28 Cal. 86.

51 54 Cal. 519, To same effect, Thomas v. Anderson, 55 Cal. 46; People v. Center, 66 Cal. 567, 570, 5 Pac. 263; 6 Pac. 481; Kimple v. Convay, 69 Cal. 71, 10 Pac. 189; Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475; In re Rose, 72 Cal. 578, 14 Pac. 369; S. C. 80 Cal. 168,

and entry of judgment pointed out in Gray v. Palmer, and other cases, and the change of the statute upon the adoption of the codes, proceeded thus: "The legislature must be presumed to have been familiar with these decisions, and to have had them in view when it changed the clause as above stated. It adopted the definitions which the court had given to the two words, by substituting one for the other. It in effect enacted that thereafter an appeal must be taken within one year after the entry, instead of within one year after the rendition of a judgment; and that both the 'entry' and 'rendition' of a judgment had been correctly defined by this court." In this case the notice of appeal was served and filed October 17, 1878, but judgment was not entered until October 29, 1878.

§ 486. Right of party with respect to entry of judgment.

It is doubtful if the ministerial function of the clerk extends further than its adequacy to insure the correct and certain exercise of judicial power. While theoretically it may be that the clerk should be presumed to draw up a suitable decree upon numerous and complicated findings and conclusions of law, in an equity case, yet this is a matter wherein theory and practice must meet halfway. As was said in Broder v. Conklin:[52] "There are many judgments whose entry involves nothing more than clerical or ministerial duties, such as a judgment for the recovery of specific real or personal property, or a fixed amount of damages, or one which is rendered generally that the plaintiff is not entitled to recover his demand from the defendant. In such cases the mere order for judgment in favor of the defendant or the plaintiff is all that is needed for the clerk; but in many other actions, and especially in those of an equitable nature, the form of the judgment, and the character of relief that is to be granted, are as much a matter for the exercise of

169, 22 Pac. 86; Onderdonk v. San Francisco, 75 Cal. 535, 17 Pac. 678; Home of Inebriates v. Koplon, 84 Cal. 488, 24 Pac. 119; Wells v. Kreyenhagen, 117 Cal. 331, 49 Pac. 128. Case cited in text approved in Durant v. Comegys, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755, and distinguished in Parrott v. Kane, 14 Mont. 28, 35 Pac. 243, the state of facts differing.

[52] 98 Cal. 360, 364, 33 Pac. 211.

judicial powers as is the determination of the party in whose favor judgment is to be rendered."

If a judgment has been properly and legally rendered, the rights of the parties should not be lost by the expiration of the term of office or death of the judge or his refusal to direct the form of the judgment, or for any other cause. In such a case a party's attorney—probably the attorney for either party—may, in case of the refusal of the judge trying the case or of his successor, prepare a proper judgment, and upon the refusal of the clerk to enter it could compel him to do so by writ of mandate. Especially would this be true in the case of a final judgment.

§ 487. Essentials of judgment.

No form is prescribed by the California Code of Civil Procedure for judgments, and probably the statutes of no state attempt to reduce to form that which must present in practice so many features and contain such variety of matters. It is usual to insert as an introduction recitals of numerous jurisdictional and even of other facts; but a judgment beginning, "In the above-entitled action it is adjudged," etc., would meet all legal requirements. The jurisdictional facts are presumed to have existed, unless and until the judgment is attacked; and then the whole record must be resorted to to determine whether or not the court had jurisdiction. Much less reason or necessity is, therefore, a recital of facts intended to show the regularity of the proceedings, the burden being always on him who asserts the contrary to show irregularity. As has been many times and will be again stated, irregularity, in the above respect, stands upon the same footing as error. The foregoing remarks equally apply to the order for judgment entered in the minutes in cases where the trial is by jury or findings are waived, no prelude by way of recitals being required.[53] In Green v. Swift[54] the court said: "There being no affirmative recital that the plaintiff appeared at the trial, it is now claimed that the fact that he did not appear is therefore made manifest. But this position cannot be maintained. If all the recitals by

53 See post, § 590, as to presumption of waiver of findings.

54 50 Cal. 454.

which the judgment is preceded had been omitted from the record, such omission would not have affected the validity of the judgment in any respect."

And since the Code of Civil Procedure[55] prescribes what shall constitute the judgment-roll, and in no case is any order for judgment one of the matters to be contained therein, it would seem that no order for judgment or minute entry is in any case essential to the validity of a judgment. This proposition is supported by the fact that the findings or verdict of a jury, or report of a referee, which takes the place of findings by the court are required to be made a part of the judgment-roll. The judgment-roll is the highest evidence known to the law—the exclusive evidence prescribed by statute—of the validity of judgments, and their absence of its invalidity. Of course, if the clerk should enter a judgment prematurely, or without authority, that would raise a different question to determine which a minute order made by him might be important, but would not be by any means conclusive.

But while the absence of recitals does not weaken the force and effect of a judgment, yet when the question of the right of appeal arises and the judgment or a minute order found in the record on appeal shows, by way of recital, that for any reason the right does not exist, such recitals will be accepted as at least prima facie evidence of the facts recited.[56] These views are not inconsistent, however, with the proposition first stated above. A party injured by false recitals in a judgment or in the minutes, has the right to have them stricken out, or corrected on motion. Failing to exercise such right, he may well be presumed to affirm their correctness and truth. The findings will usually disclose any falsity of recitals in the judgment or minutes; and it is always possible to expose false recitals by means of a statement or bill of exceptions.

On account of the use thus made of recitals in judgments and minute orders, undue importance has been sometimes attached to such use. If the record in the preparation of which both the parties have participated, or the correctness of which they do not

55 Cal. Code Civ. Proc., § 670.

56 Leese v. Clark; 28 Cal. 26, 37.

deny, and to correct which no proper steps have been taken shows that the appellant has gone through the forms of taking an appeal without right, it is not only the proper province, but the duty of the supreme court to refuse to entertain it, or if the appeal be entertained to accept such recitals as if presented by both parties. Accordingly in Spinetti v. Brignardello[57] where it was recited in the judgment that it was entered "on reading and filing the stipulation of the respective parties," thus affirmatively showing that it was a "consent" judgment, the court affirmed it without considering the points urged against it.

And if a party, having the right to correct erroneous recitals in a judgment, allows the case to reach the supreme court with recitals in the judgment or allows a minute entry containing them to remain in the record showing that, regardless of what other proceedings or the evidence may have been, the judgment entered is erroneous under any and all circumstances, he, though having an interest in sustaining it, cannot complain if the court reverses it for such manifest error. In Abbott v. Douglass,[58] there was no statement, and the judgment was as follows: "In this case witnesses were sworn and examined for plaintiff and defendants. The court, after due consideration, and being fully advised in the premises, ordered that the answer of C. D. Douglass, one of the defendants herein, be, and the same is hereby, stricken out; and that thereupon the default of said Douglass be entered, and the plaintiff, H. J. Abbott, have judgment against said defendant C. D. Douglass for the sum of three thousand dollars and his costs of suit, as prayed for in the complaint." The supreme court after demonstrating fully that upon these recitals there could be no presumption or conjecture in favor of the correctness of the action of the lower court, reversed the judgment and ordered a new trial.

But recitals in a judgment of matters which must appear independently in the judgment-roll cannot be accepted as a substitute for the latter; for instance, it was held that a recital that summons was served could not be accepted as a substitute

57 53 Cal. 283. See, also, Meredith v. Santa Clara etc. Co., 60 Cal. 617, 621.

58 28 Cal. 296.

for the summons and proof of service required to constitute part of the judgment-roll.[59]

§ 488. Judgments distinguished from orders.

The question of what is a final judgment, distinguishable from interlocutory orders or judgments and decrees, and other orders, involves the consideration of other matters than the time or stage in the proceedings at which a party supposes a final judgment to exist or to have been rendered or entered. There may be no question as to the time or stage of the action or proceeding, and yet there may be a question whether a valid judgment exists in any sense. Hence it becomes necessary to inquire what constitutes the essential essence of a final judgment as distinguished from an order or a judgment which does not possess the essential elements of finality. The Code of Civil Procedure[60] defines a judgment as "the final determination of the rights of the parties in an action or proceeding."

In the provisions for appeals[61] the term "final judgment" is employed, but evidently in the same sense. As will be presently shown, there can be only one judgment in an action or proceeding, and that, the final judgment, although the words "interlocutory judgment" are sometimes employed to signify "interlocutory order."

The code definition of a judgment leaves open to discussion the inquiry, When are the rights of parties disposed of by an act of the court, or what act of the court amounts to a disposal of the rights, of the parties?

In the determination of this question mere forms are to be disregarded. The rights of the parties—that is to say, the material issues involving all the merits of the action—may be disposed of by an act of the court as well in the form of and in the phraseology sometimes employed in an order as otherwise. On the other hand, an act of the court which amounts to no more than an order disposing of some matter incidental to the merits of the case, constituting it a mere order, may take the

59 McKinley v. Tuttle, 42 Cal. 577.

60 Cal. Code Civ. Proc., § 577.

61 Cal. Code Civ. Proc., §§ 939, 963.

form of a judgment, but be treated as a mere order, nevertheless. Nor would its character be altered by the fact that it was an order from which an appeal was allowed by statute. The courts, in distinguishing between orders and judgments, will look exclusively to matters of substance disregarding mere forms. Very early in the judicial history of California the court was called upon to make the distinction and said: "What, then, is the distinction between an order and a final judgment? The former is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. The latter is the determination of the court upon the issue presented by the pleadings, which ascertain and fix absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation, and puts an end to the suit. The appeal in the case at bar is from a decision pronounced upon the trial of an issue formed by a complaint filed for a specific purpose, and an answer on the part of the person complained against. The subject matter in dispute is the possession of the vessel—the issue tendered by the pleadings is, which party has the right to that possession—and the award of the court decides that issue definitely in favor of the plaintiff, and puts an end to the litigation. The mutual allegations of the parties are more nearly analogous to pleadings in original suits, than they are to papers upon which motions for interlocutory orders are made, and the decision of the court is in form, phraseology and effect a final judgment." The act of the court entered as a judgment directed restitution of a vessel in controversy, provided the defendant did not pay a certain sum of money within a given time. And this was held to be a final judgment.[62] At the next term of the court, and in the case of Belt v. Davis,[63] the court criticised its former definition of a judgment as being too narrow and arbitrary, expressed the view that some acts of a court might constitute the rendition

[62] Loring v. Illsley, 1 Cal. 24, 28.

[63] 1 Cal. 135.

of final judgment, which did not fall within its prior definition. The court referred to a federal decision under a statute providing for appeals from the final judgment and decrees of state courts in certain cases, and said: "It was held under this act that the words 'final judgment' in the above section must be understood as applying to all judgments and decrees which determined the particular cause, and that it was not requisite that such judgments should finally decide upon the rights which are litigated." But whatever may have been the relative value of the views expressed in these two cases, that expressed in the first case appears to have obtained the greater favor. This is evident from the fact that it is almost identical in phraseology with the definition given in the Practice Act, and subsequently in the code. There is much force, however, in an expression quoted in Belt v. Davis from a New York case, that "this question is not to be determined by technical definitions and verbal criticisms on the terms and phrases in which judgments have been, or may be, expressed."

§ 489. Appeals lie from certain interlocutory decrees.

By an amendment, adopted in 1864, an appeal was allowed "from an interlocutory judgment in actions for partition of real property." In 1899, the section[64] was further amended so as to allow an appeal "from an interlocutory judgment, order or decree hereafter made or entered in any action to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and ordering an accounting."

A decree, in the nature of an interlocutory order, may be so framed as to be final and appealable in the absence of such statute. Thus it was held that a decree, under the bill

[64] Cal. Code Civ. Proc., § 939. The fact that order of sale made upon motion, was entitled "decree of foreclosure and order of sale," does not make it a final judgment from which an appeal may be taken with six months from its entry. The character of the court's action or direction is to be determined by the nature of the action itself, considered in the light of the authority conferred upon the court, rather than by what its action has been designated by the court: Byrne v. Hoag, 126 Cal. 283, 58 Pac. 688.

for the sale of mortgaged property, ordering the payment of a specified sum to plaintiffs, the sale of the premises by a master, and permitting the case to pend in the court awaiting the master's report, was a final decree, so as to be appealable.[65] But to hold that the word "judgment," as used in these amendments, means anything more than "order" would create an irreconcilable conflict between the sections wherein it is used and section 577, defining a judgment; also with decisions of the supreme court to the effect that but one judgment can be entered in an action[66] The term "judgment" was probably employed as a concession to the general idea acquired from chancery practice prior to the era of practice acts and codes, wherein "interlocutory decrees" was a familiar term.

The advantage and importance of a provision, such as that inserted by the amendment of 1899, was pointed out in Watson v. Sutro,[67] where it was held that an interlocutory decree in cases other than partition was not appealable, but was to be reviewed on appeal from the final decree. The court said: "It is to be regretted that this is the law. There are many actions, notably actions for an accounting, in which almost the whole controversy may be as to whether an interlocutory decree should be made; and the parties should not be compelled to wait until a final decree is rendered, and then to drag the whole case up to the appellate court, in order to present a question which could with much less expense be presented at once. The due administration of justice requires that where an interlocutory decree is proper, it should be placed upon the same footing as interlocutory decrees in partition. But it is for the legislature to make the change."

In Thompson v. White[68] it was held generally that interlocutory decrees made in equity cases were reviewable on appeal

65 Lohman v. Cox, 9 N. M. 503, 56 Pac. 286. But an interlocutory decree for an accounting cannot become final until the balance is ascertained in the absence of a statutory provision: Musser v. Edmonds, 23 Utah, 425, 64 Pac. 1105. See,also, Standard Steam L. v. Dale, 20 Utah, 469, 58 Pac. 1109.

66 See Fox. v. Hale etc. Co., 112 Cal. 568, 44 Pac. 1022.

67 77 Cal. 609, 611, 20 Pac. 88.

68 63 Cal. 505; Same case, 76 Cal. 381, 18 Pac. 399.

from the final judgment. In the Watson v. Sutro case it was held that interlocutory decrees were not by themselves appealable, except in the cases provided by statute; and in the Fox v. Hale & Norcross Co. case it was held that there could be no more than one judgment in an action whether at law or in equity. The court seems to have hesitated to say so, in so many words, but such is the substance, force and effect of the decision. Disregarding mere form of speech and circumlocution, the court overruled its former decision in the same case.[69] The order made at the end of the opinion on the former appeal was in these words: "The judgment appealed from is set aside, and the superior court is directed to enter a judgment as of the date of its former judgment against Alvinza Hayward and H. M. Levy, for the sum of two hundred and ten thousand one hundred and ninety-seven dollars and fifty cents, with interest from that date, upon the issue presented by the claim for having paid excessive price for milling the ore in the Mexican and Nevada Mills; and upon that issue the order denying a new trial as to these defendants is affirmed. As to the other appellants, except the Nevada Mill and Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants, and the court is directed upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed." In the opinion given on the second appeal, the court stated the law with undoubted correctness in these words: "We are, therefore, of opinion that the court below was not authorized to enter the judgment appealed from until all the issues between the parties before the court should be determined; and that when the court shall have filed its findings upon the issues as to which a new trial has been ordered, it will then be its duty to render a single judgment upon the whole case, which shall include the judgment so heretofore directed to be entered." It will be at once seen how impossible it was for the lower court to have conformed to the order made

[69] Fox v. Hale etc. Co., 108 Cal. 369, 44 Pac. 1022.

on the first appeal without going contrary to the view expressed on the second appeal. As to part of the order, it was directed that there should be no new trial, but judgment entered as of the date of the findings: as to the balance, there should be a new trial, new findings and a judgment for the one party or the other, thus necessarily resulting in two judgments. It expressly required that the two judgments should be of different dates.

§ 490. Appeal lies from void judgment.

An appeal may be taken from a void judgment if it purports to be a final disposition of the matter involved in the action or proceeding.[70] The same reasons favor an appeal from a void judgment as were advanced in favor of sustaining an appeal

70 Livermore v. Campbell, 52 Cal. 75, 77, the court saying: "It has been repeatedly held by this court that an appeal lies from a void judgment"; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732. See, also, Sioux Falls Bank v. McKee, 3 S. Dak. 3, 50 N. W. 1057; Fox v. Nachtsheim, 3 Wash. 687, 29 Pac. 140; Louisville etc. Co. v. Lockridge, 93 Ind. 191; Board of Commrs. v. Logansport etc. Co., 88 Ind. 199; Trullinger v. Todd, 5 Or. 36; Smith v. Ellendale Mill Co., 4 Or. 70; Therkelsen v. Therkelsen, 35 Or. 75, 54 Pac. 885; 57 Pac. 373; Evans v. Adams, 3 Greene (N. J.), 373; People v. Ferris, 35 N. Y. 125. An order of a circuit court vacating a judgment, in a case in which it has not power to do so, is a final judgment, from which an appeal will lie: William Deering & Co. v. Creighton, 26 Or. 556, 38 Pac. 710. In Merced Bank v. Rosenthal, supra, the court said: "It has been held that this court will entertain an appeal from a void judgment under a law giving it jurisdiction of appeals from judgments. A judgment rendered by a court which has no jurisdiction is a judgment made by one who was not legally a judge in that case. Legal phraseology has always designated such a proceeding as coram non judice and therefore void. Still, as in this case, it would be in form a judgment, entered in the records of a court upon which final process might be issued, which, although void, might through judicial machinery be made oppressive to individuals. It is therefore a grievance which may properly be remedied by a tribunal which exists for the correction of errors." This was a case of a judge rendering judgment after the expiration of his term of office. In Therkelsen v. Therkelsen, supra, the court said: "The allowance in question being without the power of authority of the court to make, the order directing it is void, as an excess of jurisdiction, and is therefore final in its legal significance, and an appeal will lie from it: Deering v. Quivey, 26 Or. 556, 38

from a void order in Bond v. Pacheco,[71] where the court said: "But the respondent insists that if the judge had no jurisdiction to make the order at chambers, the proceeding is coram non judice and that the order is, therefore, not the subject of an appeal. There is, however, something having the form of an order, purporting to have been made subsequent to the judgment in the course of a judicial proceeding, having the sanction of the district judge assuming to act in his official capacity. It is such an order as the ministerial officers of the court would in all probability act upon. Its validity is even maintained by counsel of this court. Counsel have referred us to no authority to sustain the position that the action of the court in making it cannot be reviewed on appeal. We think the appellants entitled to have the order vacated." An appeal enables a party injured, or who may be injured in the way above suggested by the court, to get rid of the annoyance hanging over him, by means of which the adverse party cannot complain, the latter having no rights and being unable to derive any benefit from it.

And where the same reasons exist—namely, the annoyance which may result to a party—it is immaterial that the lack of jurisdiction of the court rendering the judgment renders it void. Accordingly, where the superior court, upon appeal from a void justice's judgment, tried the case, and rendered a judgment exceeding three hundred dollars, exclusive of interest, it was held that the supreme court had jurisdiction of an appeal from that judgment, even though it be void; and that such an appeal could not be dismissed for want of jurisdiction.[72] It is

Pac. 710." In Deering v. Quivey, supra, the court said: "The court, therefore, was without power to vacate its former judgment, and its action in so doing is reviewable in this court as a void judgment in a new proceeding, which must be reversed and the cause remanded for such further proceedings as may be necessary not inconsistent with this opinion."

71 30 Cal. 530, 535. A void judgment usually carries its own condemnation on its face, or in the record upon which it purports to rest: See Kingman v. Paulson, 126 Ind. 507, 22 Am. St. Rep. 611, 26 N. E. 393. It is no judgment at all except in form, and is utterly destitute of force: Smith v. Hess, 91 Ind. 424.

72 De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45. In this case the rule that an appeal lies from a void judg-

now well settled in California that there can be but one judgment in the same action or proceeding, that there is not, for appellate purposes, any intermediate ground between an order and a judgment.

§ 491. Appeal lies from vague and informal judgment.

It is not required in order to support an appeal from a judgment that it be formally correct. It may be so vague and uncertain in its phraseology and terms as not to warrant the foreclosure of a lien sought by it, for instance, and still be sufficient to authorize an appeal. Strict rules by which to determine the sufficiency of judgments for certain purposes; for instance, the purposes of an action upon it, or enforcing it, do not apply where the only question is that of the right to appeal from it. "It matters not in what form the determination of a suit is put, so that it embodies the final action of the court, it is sufficient."[73]

§ 492. Appeal lies from default judgment.

In case of a record on which a judgment by default has been rendered, containing palpable errors, or fatal irregularities, a party may seek correction by an appellate proceeding without seeking a remedy in the trial court.[74] Review will usually be limited, however, to such defects in the pleading upon which the judgment rests as could not have been obviated by proper motion or proceeding in the trial court.[75]

§ 493. Appeal lies from part of judgment.

It will be noted that in the section of the California Code of Civil Procedure, designating the subjects of appeal, no provision is made for an appeal from part of a judgment. But in section 940, prescribing how an appeal may be taken, it is provided that

ment was held applicable to an appeal from a justice's court to the superior court.

73 Zoller v. McDonald, 23 Cal. 136. See, also, Belt v. Davis, 1 Cal. 135.

74 See post, § 690, where scope of review on such appeal is discussed; also, Rhode Island Mortgage etc. Co. v. City of Spokane, 19 Wash. 616, 53 Pac. 1104.

75 See post, § 690; also Askren v. Squire, 29 Or. 228, 45 Pac. 779.

"an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney. "That this authorizes an appeal from part of a judgment giving varied forms of relief, has seldom, been doubted, and consequently there are but few decisions on the point, though the number of appeals so taken and entertained is so great as not to admit of or require extensive citation. In Luck v. Luck[76] the court, in denying a motion to dismiss the appeal, said: "The portion of the judgment appealed from is a part of the final decree, and an appeal may be taken from any final decree, whatever its nature, and from any part thereof. The fact that the court below may modify the decree, so far as the children are concerned, does not deprive the defeated party of her right to have this court say whether the judgment of the court below is correct. Such party is not bound to wait for the court below to change its judgment. The cases cited upon the proposition that the appellate court will not disturb the action of the court below in exercising its discretion in such matters have no bearing on the question as to whether the order is appealable." But this view does not prevail elsewhere, a judgment being considered an entire thing, not severable for the purposes of review. In Farmers' Bank v. Key[77] the court said: "The judgment rendered by the circuit court in favor of the plaintiff is an entirety, and the plaintiff cannot sever it, leaving the portion favorable to itself in force in the circuit court, and appeal from the remainder. The statute does not authorize the review by the appellate court of such a judgment by piecemeal. The appeal must bring up the whole judgment, in order to give the court jurisdiction over any part of it. On such an appeal the court may reverse, modify, or affirm the judgment appealed from in the respect mentioned in the notice, and may also review any intermediate order involving the merits, and necessarily affecting the judgment. The proper practice in the case at bar would have been for the plaintiff to have appealed from the

76 83 Cal. 574, 23 Pac. 1035.

77 33 Or. 443, 445, 54 Pac. 206, citing prior decisions. To same effect, Barkley v. Logan, 2 Mont. 296.

whole of the final judgment in the court below, assigning as error the intermediate order dissolving the attachment, and the refusal of the court to order a sale of the attached property in the judgment, and any other alleged error upon which it expected to rely on such an appeal. But it cannot give this court jurisdiction to review that portion adverse to it without appealing from the whole judgment."

The question of how a part of a judgment appealed from should be designated in the notice is reserved for future discussion.[78]

§ 494. Judgments entered pursuant to mandate of appellate court not appealable.

No appeal lies from a judgment of an inferior court entered in substantial compliance with the mandate of an appellate court in the same case on a former appeal.[79] This proposition is merely a resultant from the rule of "the law of the case," more fully discussed under a subsequent head, where will be found a full statement of the rule as well as its limitations.[80] The opinion and decision in Randall v. Duff,[81] appears to place the above proposition in some doubt. Temple, J., delivering the opinion said: "A motion was made to dismiss the appeal, and was submitted when the case was argued on the merits. It is contended that the judgment entered in the court below was in effect the judgment of his court, and that no appeal can be taken from it. For some purposes the judgment may be deemed on a par with the judgment which might have been entered here. But great injustice might be done if it were held that such a judgment cannot be appealed from. Serious doubt may arise as to whether the judgment entered was the judgment ordered. And such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal." Justice McFarland, concurring, said: "I con-

78 See post, § 534.

79 Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855; Apex Transp. etc. Co. v. Garbade, 32 Or. 582, 54 Pac. 367, 882, 52 Pac. 573; People's Building etc. Assn. v. Fowble, 18 Utah, 206, 55 Pac. 57.

80 Post, § 691.

81 107 Cal. 33, 36, 40 Pac. 20.

cur in the judgment and in the opinion of Mr. Justice Temple. Of course, when the lower court enters the judgment directed by this court there is an end of the litigation; but when there is a question whether or not the lower court has entered the judgment directed, then an appeal lies. If the appeal be frivolous, and not taken bona fide, the remedy is the imposition of heavy damages." It is always within the power of the appellant to raise a question as to whether the mandate of the higher court upon a former appeal has been correctly entered, and thus indefinitely prolong the litigation. The imposition of heavy damages as for a frivolous appeal suggested by Justice McFarland would not deter an irresponsible litigant, who might greatly injure the opposite party without giving other than a three hundred dollar bond. A writ of mandate would compel obedience to the direction of the appellate court in such case and would be an adequate remedy.

§ 495. Rule that consent judgments not appealable—Exceptions.

It is a well-established principle that a party cannot complain of error which he has waived, or in which he has acquiesced. An application of this principle forbids an appeal from what is known as consent judgments.[82] And it was held that a mortgagee who proceeds to sell the mortgaged premises under a decree of foreclosure waives his right to appeal from that part of the decree which directs that the sale shall be made subject to a lien adjudged to be prior to the mortgage.[83] It would seem, however, that a party cannot waive his right of appeal from a judgment on a contract void, because prohibited by statute. Thus, where there was a statute providing that in a suit on a usurious contract, the court "must" render judgment for plaintiff for the principal sum less payments made, and against defendant, in favor of the state, for ten per cent per annum on the entire principal for the use of the school funds, whether or not the unlawful interest is contested, and in no case, where unlawfully contracted for, must plaintiff have judgment for

[82] Ocobock v. Nixon (Idaho), 57 Pac. 309.

[83] Schmidt v. Oregon Gold Min. Co., 28 Or. 9, 52 Am. St. Rep. 759, 40 Pac. 406.

more than the principal sum less the payments already made, it was held that a judgment for plaintiff for the entire sum due on the usurious contract, though entered on the stipulation of the parties, was appealable.[84]

84 Mate v. Harlan, 12 S. Dak. 627, 82 N. W. 179.

CHAPTER 25.

SUBJECTS OF APPEAL—ORDERS GENERALLY.

§ 496. What constitutes an order for purposes of appeal.
§ 497. Appeals from orders authorized by statute.
§ 498. Appeal only allowable from original order—Exceptions.
§ 499. Orders on motion for relief from a "proceeding."
§ 500. Same subject—Exception as to certain orders to vacate judgment.
§ 501. Orders on motions for new trial.
§ 502. Same subject—Exception in case of appealable ex parte orders.
§ 503. Orders in injunction cases.
§ 504. Orders refusing to dissolve attachment.
§ 505. Orders changing the place of trial.
§ 506. Orders in contempt cases.
§ 507. Supervisory power limited to use of prerogative writs in contempt cases.
§ 508. Right of persons not original parties, but affected by orders.
§ 509. Right of party against intruder into action.
§ 510. Appeal may be taken from void order in due form.

§ 496. What constitutes an order for purposes of appeal.

"Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order."[1] The definition is inept. It would exclude all interlocutory directions which become final by being carried out and "included" in the judgment, such as are made in partition suits. It would exclude interlocutory orders in actions against fiduciaries for an accounting, in which the court finds that the plaintiff has established a right to have the defendant account to him and directs that an account be taken—that is, that the amount for which judgment shall be entered be ascertained. A judgment in such action could not be drawn which negatived the right to an accounting—that is to say, which did

[1] Cal. Code Civ. Proc., § 1003.

not include it, and which did not also specify the sum ascertained upon such accounting. Those directions made collaterally to the action; for instance, for the payment of counsel fees, and alimony, and appointments of receivers are not necessarily, in fact seldom are, included in the judgment. But it is difficult to perceive how the definition can apply to many nonappealable orders, such, for instance, as orders for nonsuit orders on demurrer, orders directing verdicts—in fact, to any order for judgment. A better definition would be as follows: Every direction of a court or judge, made, or entered, in writing, other than the final judgment, in an action or proceeding.

But, added to the confusion resulting from a general misunderstanding of the distinction between an order and a judgment, is that resulting from the habit of appellate courts of using the terms "order" and "judgment," and "final order" and "final judgment," interchangeably. Such misleading phraseology is most frequently found in decisions and opinions in states where appeals are extended, or limited, to all orders and judgments which affect the substantial rights of a party without expressly designating, as is done by the California Code,[2] the orders from which appeals may be taken.

Within the definition, there can be no such thing as a verbal order. In Campbell v. Jones,[3] the respondent moved to strike from the transcript the defendant's statement on motion for a new trial, on the ground that the same was not filed in proper time. In response to this motion, the appellant showed that the district judge had, in due time, verbally promised to have an order extending the time for filing the statement entered in the minutes of the court, which, if done, would have rendered the filing of the statement within legal time. This, however, the judge, through forgetfulness, had failed to have done. The court, in refusing to consider the statement, and affirming the judgment, said: "An order extending the minimum time fixed by statute for filing statement, on motion for a new trial, should, in all cases, be in writing, and either entered in the minutes of the court, in open session, or signed by the

2 Cal. Code Civ. Proc., §§ 963, 1714, 1715.

3 41 Cal. 515, 518. Followed to effect that verbal order of judge is ineffectual in Shumway v. Leaky, 73 Cal. 262, 14 Pac. 841.

judge, and filed, with the papers in the case, within the time prescribed by the one hundred and ninety-fifth section of the Practice Act. To hold that a verbal promise of the judge to cause an order to be entered, or that a verbal request for an order, verbally granted by the judge, was sufficient to extend the time for filing the statement, would lead to great confusion and needless controversies. The statement in the present case was not filed by appellant within five days after the filing of the notice of his intention to move, and there was no order of the court or judge extending the time beyond the five days."

An order, to be effective as such, must be a positive direction, and not a mere expression of opinion of the legal effect of what has preceded. Accordingly, it was held that a mere declaratory order, signed by a judge, not purporting to vacate or dissolve an injunction, but merely declaring that the injunction was no longer in force, which order was not filed with the clerk, nor intended to be entered in the minutes of the court, was not a "direction" of the court nor an appealable order.[4]

[4] Devlin v. Rydberg, 132 Cal. 324, 64 Pac. 396. The facts and views of the supreme court in this case, per Justice McFarland, on sustaining a motion to dismiss the appeal, are very instructive on the subject under consideration, and are in part as follows: "The superior court granted an injunction in the above-entitled cause, January 8, 1900, restraining the defendant from doing certain acts therein specified, and on January 12, 1901, the Honorable F. J. Murasky, judge of said court, signed a written instrument, wherein, after reciting the granting of the injunction, and that more than twelve months had elapsed since it was granted, and that the action had never been set for trial or tried, and that the defendants had not consented to the continuance of said injunction, it was 'ordered, adjudged, and decreed that said injunction is no longer in force.' This instrument was not filed with the clerk or entered in the minutes of the court, but on January 25th the plaintiff's attorney filed a certified copy thereof in the clerk's office, and on February 5th, at his request, it was copied by the clerk into the minutes of the court, February 6th, the defendant gave notice of an appeal from this order. The plaintiff now moves to dismiss the appeal, upon the ground that the entry by the clerk, upon the minutes of the court, a certified copy of an order is not an order of the court, and upon the further ground that an order declaring that an injunction is no longer in force is not an appealable order. Section 1003 of the Code of Civil Procedure defines an order to be a 'direction' of a court

The Nevada supreme court has, however, accepted what was said in Campbell v. Jones as authoritative, and, under similar statutory conditions, on the subject as are found in California, held that, to be effectual, an order must be not only signed, but filed.[5] There is a previous decision in California, however, holding that where an order extending time for answering had been signed by the judge, but not filed, and a judgment by default was taken against the party obtaining the order, the default should be set aside on motion; and the supreme court, in affirming the order, said it was not aware of any provision of law requiring an order to be filed.[6] This case was evidently overlooked by the Nevada court, in so far as it has based its decision on authority.

or judge, made or entered in writing, and not included in a judgment, and section 939 provides than an appeal may be taken from an order 'granting or dissolving an injunction.' The order appealed from is not a 'direction' of the court, nor does it purport to dissolve the injunction previously granted, or, by its terms, to have any effect upon that injunction. It is a mere declaration by the judge that the injunction is no longer in force. That it was not the intention of the judge that it should be considered as an order of the court, may be inferred from the fact that he did not cause it to be entered upon its minutes or filed with the clerk. It also appears upon the face of the writing that he erased from the form presented for his signature the words, 'and the same is hereby vacated and dissolved,' and it is clear from this fact that he did not intend that the injunction previously granted should be dissolved by reason of this order. No authority has been cited in support of the authority of the clerk to enter upon the minutes of the court a certified copy of an instrument without any direction of the court therefor.''

5 Clark v. Strouse, 11 Nev. 70, 79. The court in reversing the order granting a new trial on the ground that an order extending time had not been filed, said: 'Even if we should concede the admissibility of the testimony offered to establish the date when the order was signed, we think it would not benefit the respondent. We are of opinion, that an order signed by the judge, extending the time fixed by statute for filing a statement on motion for a new trial, must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute: Campbell v. Jones, 41 Cal. 518.''

6 Swift v. Canavan, 47 Cal. 86. Followed in Elliot v. Whitmore, 10 Utah, 258, 37 Pac. 463, holding that order need not be filed or served.

It is not necessary that signed orders be made in open court and an appeal from an order made at chambers will lie.[7]

A written order signed by the judge is an order "made." While the court in the above case of Campbell v. Jones states

[7] Sullivan v. Triunfo etc. Co., 33 Cal. 385. In this case the court, after showing that the appealability of an order is not affected by the fact that it is made ex parte, said: "It is said that no case can be found in the California reports, in which the right to appeal from an ex parte order granting an injunction has been determined, and that this fact indicates a practical construction of the act against the right. But the absence of such a determination may easily be accounted for upon other principles. Ordinarily, when time is important, the party temporarily enjoined would seek the quickest mode of relieving himself from the order; and obviously that would be to apply at once to the judge who made it, either without or upon notice, as the exigencies of the case might seem to render most advisable, to dissolve it. Probably in ninety-nine cases out of a hundred this would be the course pursued. But the action of the judge, whatever it might be upon the application, would not be final, for whether he dissolved, or refused to dissolve, the injunction, the losing party would be entitled to appeal. A case might, therefore, arise in which it would be more advantageous to the party restrained to have a speedy decision from the court of last resort, which would be final, than to obtain for the time being a dissolution of the order of the judge who made it with a right of appeal, and the control of the appeal and consequent power to delay a final determination remaining in the party seeking the injunction. The statute allowing an appeal in the first instance was, doubtless, designed to provide for such cases. However this may be, the causes indicated are amply sufficient to account for the fact that appeals are much more frequently taken after an application to dissolve than before. But there are two cases at least, in which the right of appeal from ex parte order granting an injunction has been recognized. In the case of Martin v. Travers, 7 Cal. 253, an ex parte injunction having been obtained, and a motion to dissolve made and denied, an appeal was taken from the order refusing to dissolve the injunction. The court held, that, under the provisions of sections 336 and 347, of the Practice Act, as they then stood, no appeal was allowed, and said: 'The appeal should be taken from the order granting an injunction.' The decision was rendered in 1857, and, sections 336 and 347, as amended in 1854, then in force, only provided for an appeal 'from an order granting or dissolving an injunction.' The amendment allowing an appeal 'from an order refusing to grant or dissolve an injunction,' was subsequently made. It is true that it was only necessary to decide that under the law as it then stood, no appeal

that an order should be either entered in the minutes, or signed by the judge "and filed," and while that is the usual and better practice, yet there is no code provision requiring such orders to be filed. Rules requiring them to be both served and filed within a given time are found in most courts. Any other practice would lead to intolerable abuse and inconvenience.

§ 497. Appeals from orders authorized by statute.

Of the numerous orders which may be made in an action, it is seen that only a part, presumably those considered to be of most importance, and to affect the rights of a party most directly and immediately were selected by the legislature of California as proper subjects of appeal.[8] Orders not enumerated

could be taken from an order refusing to dissolve the injunction. But the question immediately associated with the question decided, at once arose in the minds of the court. Is there, then, no remedy in case of refusal to dissolve? And if there is, what is it? Upon looking at the statute, the answer was obvious. There is a remedy, for an appeal lies 'from the order granting an injunction.' It is so expressly provided. The court, therefore, at once said the appeal must be taken from the order which created the mischief—the order in which the error was first committed. And this must be correct, or there was no remedy at all so far as the provisional injunction was concerned. There was no means of correcting the second error by appeal from the order refusing to dissolve, and if there was no appeal from the order granting the injunction, it was only necessary to procure the order ex parte and a refusal to dissolve, and the injunction would remain till the final disposition of the cause, whether properly granted or not—a condition of things which we do not think was contemplated, and the court in the case cited was evidently of the same opinion.''

8 In addition to judgments, orders affecting substantial rights, which determine the action, and prevent final judgment are appealable in Washington: Wash. Laws (1893), p. 119, c. 61, §1, subd. 6. For instance, an order quashing a summons and the service thereof, made upon a determination that the action was without merit: Embree v. McLennan, 18 Wash. 651, 52 Pac. 241; an order denying a motion to strike objections to the confirmation of a sale of land on execution: Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054; an order granting plaintiff's motion for the voluntary dismissal of his action is an appealable one, where prior to such dismissal he has obtained an order of the court vacating a decree of foreclosure and sale thereunder in

may be reviewed on appeal from the judgment, or on motion

the same action: Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; an order denying a motion to cancel a lis pendens: Washington Dredging etc. Co. v. Kinnear, 24 Wash. 405, 64 Pac. 522; an order quashing a return on a summons by publication as not having been made within ninety days after the filing of the complaint, as required by Laws of 1895, page 170, section 1: Deming Inv. Co. v. Ely, 21 Wash. 102, 57 Pac. 353; an order dismissing an action as to some of the defendants, though not all: Pennsylvania Mortg. Inv. Co. v. Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; an order striking from a complaint by a county against a county auditor and his sureties allegations settling up, as a ground of recovery, a breach of the bond by failure, to account for moneys received by him as ex-officio clerk of the board: Snohomish County v. Ruff, 15 Wash. 637, 47 Pac. 35, 441. Under Laws of 1893, page 119, section 1, paragraph 5, providing for an appeal "from any order appointing or removing, or refusing to appoint or remove, a receiver," an order discharging goods from the possession of a receiver is appealable: Armstrong v. Ford, 10 Wash. 64. 38 Pac. 866. The following orders were held nonappealable orders under the statutes of Washington: An order denying a motion for judgment by default on the ground that defendant had one day more in which to plead is not appealable: Schlotfeldt v. Bull, 13 Wash. 242, 43 Pac. 33; an order setting aside a default, and granting leave to answer, whether the proceeding be by motion in the original case or by petition in a new one, is not appealable: Reitmeir v. Siegmund, 13 Wash. 624, 43 Pac. 878; an appeal will not lie from an order sustaining a demurrer to a complaint, there being no provision therefor in Laws of 1893, chapter 61, which provides that only such orders as are specified in that act shall be appealed from: Mason County v. Dunbar, 10 Wash. 163, 38 Pac. 1003; an order vacating a judgment is not appealable under any of the provisions of Ballinger's Code, section 6500, authorizing the right of appeal: Nelson v. Denny, 26 Wash. 327, 67 Pac. 78; an order that the proceedings before the superior court be sent to the supreme court for the determination of the points in controversy is not appealable. Munson v. Mudgett, 14 Wash. 662, 45 Pac. 306; an order denying a motion to quash a summons is not appealable as a final order: Prussian Nat. Ins. Co. of Stettin, Germany, v. Northwestern Fire etc. Ins. Co. of Portland, Oregon, 19 Wash. 281, 53 Pac. 158; an order sustaining a demurrer is not an appealable one: Padley v. Gregg, 26 Wash. 322, 67 Pac. 72; an order denying plaintiffs' motion for judgment against garnishees who have answered, made under 2 Ballinger's Annotated Codes and Statutes, section 5402, providing that such judgment may be ordered in certain cases, is not an appealable order, since such order

for new trial,[9] and if they be erroneous and affect a substantial right may warrant a reversal or new trial.

is not such a final determination of the parties as contemplated by code, title 36, authorizing appeals from final orders and judgments; the order, if erroneous, being therefore reviewable on appeal from the judgment: Green v. Moore, 24 Wash. 241, 64 Pac. 151; order refusing to direct verdict for defendant and for nonsuit nonappealable: Dassett v. St. Paul etc. Lumber Co., 28 Wash. 618, 69 Pac. 9; an appeal will not lie from an order of a district court requiring that appellee on an appeal from justice's court give the bond required of a plaintiff not resident of the state, or that the action would be dismissed at his cost, since Code of Civil Procedure, sections 1722, 1723, as amended by Session Laws of 1899, page 146, enumerating the orders and judgments from which appeals may be taken to the supreme court, is exclusive, and does not designate any such order: State v. Napton, 24 Mont. 450, 62 Pac. 686; exceptions to the taxation of costs are reviewable only on appeal from the judgment and such order is not appealable: Montana Ore Purchasing Co. v. Boston etc. Min. Co. (Mont.), 70 Pac. 1114; an appeal from an order by the district court taxing costs will not lie: Murray v. Northern Pacific Ry. Co., 26 Mont. 268, 67 Pac. 625; objections to such costs are reviewable only on direct appeal from the judgment itself: State v. Millis, 19 Mont. 773, 48 Pac. 773; an order refusing to appoint a receiver is not appealable: Cotter v. Cotter, 16 Mont. 63, 40 Pac. 63; an appeal will not lie from an interlocutory order: De Harrison v. Perea (N. Mex.), 70 Pac. 558; appeal not allowed from order refusing application to intervene: Cobree Grande Copper Co. v. Greene (Ariz.), 68 Pac. 524; order quashing an information in proceeding to remove county commissioners, held nonappealable: Mahoney v. Elliott (Idaho), 69 Pac. 108; under Revised Statutes, subdivision 5, section 4831, which provides that an appeal may be taken from an order "against or in favor of directing the partition, sale, or conveyance of real property," an order denying the issuance of an order to show cause why the real estate of a decedent should not be sold to pay claims against his estate is an appealable order: State v. Whelan (Idaho), 53 Pac. 2; an order in an escheat proceeding directing specified persons who are not parties thereto to turn over to a re-

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[9] Nonappealable orders: Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; order dismissing action; McFarland v. Halcomb, 123 Cal. 84, 55 Pac. 761, directing that complaint be made more definite and certain: Estate of Turner, 128 Cal. 388, 60 Pac. 967; order denying a motion for an amendment of the claim upon the mortgage note by including the mortgage in the claim is not appealable; and an ap-

The general rule is that appeals from interlocutory orders

ceiver certain property which has been received by them is an appealable order, under section 535 of Hill's Annotated Laws: State v. O'Day, 41 Or. 495. 69 Pac. 542; an order discharging an insurance company, sued on a policy, from further liability on depositing the amount of the policy with the clerk, was final as to the company, and hence appealable where the company admitted liability, and alleged that conflicting claims to the fund were made by two persons whom the court required to interplead: Jones v. New York Life Ins. Co., 14 Utah 215, 47 Pac. 74; order dismissing action appealable: Heegaard v. Dakota etc. Trust Co., 3 S. Dak. 569; 54 N. W. 656; order refusing to set aside order made in excess of jurisdiction—appealable: Thompson etc. Co. v. Guenthner, 5 S. Dak. 504, 59 N. W. 727; appeal lies from order denying motion to withdraw complaint in intervention: Schaetzel v. Huron (City of), 6 S. Dak. 134, 60 N. W. 741; order directing issuance of mandamus—appealable: Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784, 80 N. W. 757. Other appealable orders are: Denying motion to fix time to hear motion for new trial: Daley v. Forsythe, 9 S. Dak. 34, 67 N. W. 948; granting execution: American S. & L. Assn. v. Campbell, 8 S. Dak. 170, 65 N. W. 815; vacating an order setting aside sheriff's sale made under foreclosure: Bailey v. Scott, 1 S. Dak. 337, 47 N. W. 286; dismissing appeal from a justice of the peace: Travelers' Ins. Co. v. Weber, 2 N. Dak. 239, 50 N. W. 703; directing verdict: First Nat. Bank. v. Laughlin, 4 N. Dak. 391, 61 N. W. 473; Minnesota Threshing Co. v. Lincoln, 4 N. Dak. 410, 61 N. W. 145; granting or refusing habeas corpus: Winton v. Knott, 7 S. D. 179, 63 N. W. 783; overruling demurrer: Greeley v. Winsor, 1 S. Dak. 618, 48 N. W. 214; appointing referee to hear and determine all the issues: Russell v. Whitcomb, 14 S. Dak. 426, 85 N. W. 860; orders not appealable are: Striking out a counter-claim because reviewable on appeal from the judgment: Noble (Township of) v. Aasen, 8 N. Dak. 77, 76 N. W. 990; dismissal for failure of proof. Appeal should be taken from the judgment entered on such order: Cameron v. Great Northern Ry. Co., 8 N. Dak. 124, 77 N. W. 1016; Hanberg v. Bank, 8 N. Dak. 328, 79 N. W. 336; for entry of judgment: Field v. Great Western El. Co., 5 N. Dak. 400, 67 N.

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peal therefrom must be dismissed: People v. Fellows, 122 Cal. 233, 54 Pac. 830; appointing an elisor: Holton v. Noble, 83 Cal. 7, 23 Pac. 58, allowing judgment on pleadings: Kimple v. Conway, 69 Cal. 71, 10 Pac. 189; order for judgment of nonsuit: Lee Chuck v. Quang Wo Chung, 91 Cal. 593, 28 Pac. 45, denying motion to set aside a judgment from which an appeal has been taken and refusing to strike out cost bill: Clifford v. Allman, 84 Cal. 528, 24 Pac. 292; striking out a complaint: Garthwaite v. Bank of Tulare, 134

are the creations of statute, and cannot be extended by implication.[10]

§ 498. Appeal only allowable from original order—Exceptions.

It may be stated as a general principle that an appeal cannot be taken from orders denying motions to set aside orders. If the order of which a review is sought, be appealable, the appeal must be taken from that order. An order refusing to disturb a judgment or former order is the mere negative action of the court declining to disturb its first decision. It is

W. 147; Loche v. Hubbard, 9 S. Dak. 364, 69 N. W. 588; discharging receiver: Hoffman v. Bank, 4 N. Dak. 473, 61 N. W. 1031; sustaining demurrer to answer, no judgment having been entered: Harris Mfg. Co. v. Walsh, 2 Dak. 41; 3 N. W. 307; refusing to set aside service of summons: Ryan v. Davenport, 5 S. Dak. 203, 53 N. W. 568; refusing application for judgment on findings of jury: Persons v. Simons, 1 N. Dak. 243, 46 N. W. 969; when costs are improperly taxed against a party, his proper remedy is by motion to have the judgment modified, and not by appeal: Sorenson v. Donahoe, 12 S. Dak. 204, 80 N. W. 179; a mere order for judgment is not appealable, but is reviewable upon appeal from the judgment: In re Eaton, 7 N. Dak. 273, 74 N. W. 870; order sustaining demurrer to petition in election contest and refusal of leave to amend nonappealable: Turner v. Hamilton (Wyo.), 67 Pac. 1117.

Cal. 237, 66 Pac. 326; refusing to dismiss action; Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71, 47 Pac. 872; refusing to vacate an order substituting a person as plaintiff in place of the original plaintiff: Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122, denying motion to set aside default, striking out demurrer, and entry of judgment; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, striking from files affidavits in support of motion for new trial, while pending; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115, interlocutory order; Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61, authorizing receiver, appointed to take charge of and work mining property, to purchase a cyanide tailings plant, in order to work a large quantity of tailings of great value, to be paid for out of any funds coming into his hands.

10 Juan v. Ingoldsby, 6 Cal. 440; De Barry v. Lambert, 10 Cal. 504; Baker v. Baker, 10 Cal. 527; Hopper v. Kalkman, 17 Cal. 517, holding order made before judgment refusing to transfer from a district court to the circuit court of the United States to be not appealable; Wenborn v. Boston, 23 Cal. 321, holding order refusing to allow an intervention to be nonappealable, because not mentioned in the statute among orders from which an appeal might be

that decision which is the proper subject of complaint, and the refusal to alter it any number of times would not make it less so.[11] Such being the general rule, it is not so important to consider it and cite the almost innumerable authorities which might be cited in its support, as it is to state and give the rationale of the exceptions to it which are numerous and important. The language of Temple, J., in Pignaz v. Burnett[12] covers almost the entire subject of exceptions to the rule. The opinion is an able statement of reasons underlying the exceptions. He said, in part: "The only possible reason for refusing to entertain appeals in those cases was that the party aggrieved had already had an opportunity to appeal from the same ruling, and cannot extend his time for taking an appeal by making the court repeat its ruling. But the reasons cannot apply where no appeal could be taken from the first or-

taken and as not coming within the definition of a judgment; Moulton v. Ellmacher, 30 Cal. 528, holding order overruling a demurrer not appealable, the remedy being to appeal from the judgment entered; Gates v. Walker, 35 Cal. 289, same ruling; Sutter v. San Francisco, 36 Cal. 114, same ruling as to orders striking out part of pleading and sustaining demurrer; Daniels v. Landsdale, 38 Cal. 567, same ruling; Hibberd v. Smith, 39 Cal. 145, same ruling; Agord v. Valencia, 39 Cal. 292, 297, same ruling; Rhodes v. Craig, 21 Cal. 419, same rule as to order staying proceedings in action, remedy being writ of mandate; Haraszthy v. Horton, 46 Cal. 545, same ruling as to order refusing a continuance.

11 Henley v. Hastings, 3 Cal. 342. See, also, California Southern R. R. Co. v. Southern Pac. R. Co., 65 Cal. 295, 4 Pac. 13; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Eureka Co. v. McGrath, 74 Cal. 51, 15 Pac. 360; as to order refusing to vacate judgment; Tripp v. Santa Rosa Co., 69 Cal. 632, 11 Pac. 219, as to order refusing to vacate former order; Davis v. Donner, 82 Cal. 36, 22 Pac. 879, as to order refusing to vacate writ of assistance; Travelers' Co. v. Weber, 2 N. Dak. 246, 50 N. W. 703, as to order refusing to vacate an order dismissing an appeal; Baker v. Baker, 83 Fed. 5, holding that where defendants failed to appeal from an interlocutory granting a perpetual injunction, within the time prescribed by statute, they could not therefore appeal from an order refusing to dissolve the injunction; Estate of Burns, 54 Cal. 223, as to second order in matter of setting aside homestead; Reed v. Allison, 54 Cal. 489; Higgins v. Mahoney, 50 Cal. 444; Hibbard v. De Lanty, 20 Wash. 539; 56 Pac. 34.

12 119 Cal. 157, 163, 51 Pac. 48.

der or when such an appeal would be vain for lack of a record showing the rights of the aggrieved party."

The code makes several exceptions, expressly, and others by necessary implication. Without reference to orders setting aside, or refusing to set aside, verdicts and decisions and vacating judgments which may or may not have been entered, all orders made on motions made under the provisions of section 473 of the Code of Civil Procedure of California, and similar statutes found elsewhere constitute large classes of exceptions to the general rule. And, of course, all cases where judgments are attacked by suits in equity founded on accident, mistake, fraud, inadvertence, etc., fall within the same class of exceptions, the judgments therein being appealable.[13]

Some of the language used in the opinions is too broad; because failing to take cognizance of the exceptions. Thus, in Kuhle v. Hawkett,[14] it was said that there could be no appeal from an order refusing to set aside a judgment or order which is itself appealable. There is certainly no appeal from the order refusing to vacate unless the order sought to be vacated be appealable, and the rule will often be found thus broadly and unqualifiedly stated without properly regarding the exceptions to it.

It is a primary condition to the appealability of all such orders that the order or judgment sought to be set aside be itself appealable.[15]

Orders granting or refusing new trials prematurely and before the settlement of the statement inadvertently or by mis-

13 The subject of relief in such cases is discussed at large in chapter 47.

14 89 Cal. 638, 640, 27 Pac. 57.

15 See Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103, cited in Sutton v. Symonds, 100 Cal. 577, 35 Pac. 158. In this case the court said: "The order refusing to vacate the order of September 13, 1891, is not an appealable order, and for that reason the appeal therefrom must be dismissed. The order striking the statement from the files was itself appealable (Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 633), and the rule is well settled that an appeal cannot be taken from an order refusing to vacate an order which is itself appealable: Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103."

take and without proper hearing, may be set aside on motion under the provisions of section 473 of the California Code of Civil Procedure upon proper showing, and an order refusing to do so is appealable. In Morris v. De Celis,[16] the motion of the plaintiff for a new trial had been granted by the district court of its own motion, and before any statement had been settled or motion submitted by counsel. An appeal was entertained from an order refusing to set aside the order, and the supreme court reversed the order denying the motion, holding that it should have been set aside upon the defendant's application, and for the same reason—namely, that an order striking a statement on motion for new trial from the files is appealable—an order refusing to vacate that order is not appealable.[17]

It has been herein previously shown what constitutes regularity in the proceeding for new trial and that, among other essential steps, it is required that there shall be a formal hearing and submission of the motion unless the same be waived.[18] A violation of the right of a party herein, or a disregard of these essential formalities, constitutes an irregularity which, being shown on motion supported by affidavits or otherwise, entitles the party aggrieved to have the order set aside; and an appeal lies from the order on such motion. In De Gaze v. Lynch,[19] the court granted a defendant's motion for new trial without hearing, without engrossment, of the statement, without argument, without submission, and without notice to the plaintiff. The plaintiff moved on affidavits and on the minutes to set aside the order granting said motion. Upon a denial of his motion, plaintiff appealed. The supreme court reversed the order, and remanded the case for orderly procedure, stating that the act of the court operated as a surprise upon plaintiff. But such motions must be supported by affidavits,

16 41 Cal. 331.

17 Sutton v. Symonds, 100 Cal. 576, 35 Pac. 158.

18 The method of obtaining relief from such orders is fully discussed, ante, §§ 445, 446, 451, 456.

19 42 Cal. 363. See, also, Hall v. Polack, 42 Cal. 218; Nichols v. Dunphy, 53 Cal. 654; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 170, 4 Pac. 1173.

or by affidavits and other documentary evidence, and be founded upon surprise, mistake, fraud, inadvertence, etc.; that is to say, it must be projected under the provisions of the appropriate section, in order to be appealable.[20]

In Coombs v. Hibberd,[21] the court had denied a motion of plaintiff for a new trial. In so far as the record before the supreme court showed the formalities had been observed. Subsequently, the plaintiff moved to "vacate the order denying a new trial, and to grant an order allowing the motion for a new trial to be reheard," thus admitting that there had been a hearing of the motion. The application was noticed to be heard "upon the pleadings, statement on motion for new trial, stipulation of facts, the findings of the court and judgment-roll." From the order denying this motion, plaintiff appealed. The supreme court, after adverting to the case of Morris v. De Celis, said: "There is an evident distinction between that case and the one now present. There was no foundation, in the former case for any order in the premises. There was no statement upon which the court could act, and no motion for a new trial had been made. As the order stood in the way of defendant's appeal, by depriving him of the benefit of a statement, through which alone the grounds of appeal could be presented, it should have been set aside by the court that made it. The error was not that the motion for a new trial was improperly granted, but that an order was made at all." In such cases, the fact that the order was irregularly and improvidently made, takes it out of the general rule. Such a state of things, being of rare occurrence, is not to be presumed, but must be affirmatively shown.[22]

§ 499. Orders on motion for relief from a "proceeding."

An appeal may be taken from the order made on a motion to be relieved from a proceeding against a party, as well as from an order made regularly upon motion. Section 473

20 See Cal. Code Civ. Proc., § 473.

21 43 Cal. 452, 454. To same effect, People v. Mayne, 118 Cal. 516, 521, 62 Am. St. Rep. 256, 50 Pac. 654 Holmes v. McCleary, 63 Cal. 497.

22 Carpenter v. Superior Court, 75 Cal. 596, 598, 19 Pac. 174.

of the Code of Procedure of California provides: "The court may . . . . allow an answer to be made after the time limited by this code; and may also . . . . relieve a party . . . . from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." In Stonesifer v. Kilburn,[23] the court held, upon several authorities there cited, that the settlement of a bill of exceptions was a proceeding in an action, and that an appeal lay from an order refusing relief from a failure to serve a bill of exceptions within legal time. It was contended by the respondent that the order was not appealable, but the court decided otherwise and reversed the order, and stated that they had been overruled on this point by several later cases, cited by the court.

It is sometimes not easy to determine whether appeal or mandamus is the appropriate remedy in cases of this kind. Where, as in the above case, the bill of exceptions is confessedly not prepared or presented in time, and the party is seeking relief from the condition in which he is thus placed under provisions such as are contained in the California code above quoted, the application being thus addressed somewhat to the discretion of the court, an appeal lies from the order made on the application; but, if only a legal question is involved, and the party thinks the facts entitle him to a settlement of his statement or bill, as a clear legal duty, he should apply to the supreme court for a writ of mandate.[24]

§ 500. Same subject—Exception as to certain orders to vacate judgment.

Motions to vacate judgments otherwise than by granting a new trial—that is to say, under the provisions of section 473—constitute important exceptions to the general rule. There seems never to have been any question raised as to the appealability of such orders, where made upon properly constructed motions. There must certainly, however, be a showing in

23 94 Cal. 33, 43, 29 Pac. 332, citing Ketchum v. Crippen, 31 Cal. 367, and other early cases.

24 See Hicks v. Masten, 101 Cal. 651, 654, 36 Pac. 130; Careaga v. Fernald, 66 Cal. 351, 353, 5 Pac. 615; ante, § 457.

proper form, based upon some ground mentioned in said section. An appeal from an order made upon such a motion without any such showing, and after a regular trial participated in by the parties, would be no less idle and fruitless, not to say absurd, than the motion itself. And on this subject, are encountered many indiscriminating expressions by appellate courts—that is to say, unqualified statements of the general rule against the appealability of such orders. Thus, in Wickersham v. Comerford,[25] the court stated broadly that the party could not have appealed from an order denying his motion (to set aside), an order which was itself appealable. A correct statement of the general rule, with its proper qualification, is this: That a subsequent order on a motion to vacate an appealable order or judgment which has been regularly and advisedly made or entered is not appealable.[26] If the errors complained of can be considered on appeal from the judgment, the general rule applies;[27] but if not—as in case of a judgment by default—an order denying the motion to set the judgment aside is appealable.[28] Such an appeal was presented in Goyenbeck v. Goyenbeck.[29] The court, after stat-

25 96 Cal. 433, 440, 31 Pac. 358. See for other declarations of the general rule, Eureka etc. R. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Swain v. Burnett, 89 Cal. 564, 26 Pac. 1093; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; Birch v. Cooper, 136 Cal. 636, 69 Pac. 420; Estate of Murphy, 128 Cal. 339, 60 Pac. 930; Gow Scott Co. v. Spaulding, 2 N. Dak. 414, 51 N. W. 867; Bailey v. Scott, 1 S. Dak. 337, 47 N. W. 286.

26 See Doyle v. Republic Life Ins. Co. 125 Cal. 15, 16, 57 Pac. 667.

27 Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

28 McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16. It was held that where a motion to set aside a judgment was heard and determined on defendant's affidavit, which did not state facts sufficient to justify granting the motion, the order made thereon was not an adjudication which would preclude a subsequent motion for the same relief based on sufficient grounds: Whittaker v. Warren, 14 S. Dak. 611, 86 N. W. 638. Compare Wilson v. Seattle Dry Dock Co., 26 Wash. 297, 66 Pac. 384. See In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093, holding that an order refusing to vacate a judgment is appealable, so as to bring up for review that part of the case seeking a vacation.

29 80 Cal. 409, 22 Pac. 175. Citing Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Tripp v. Santa Rosa, 69 Cal. 632, 11 Pac. 219;

ing the general rule, said: "There are some exceptions to this rule, but the case does not fall within any of them."

But orders on motions to vacate judgments which are void or voidable for want of jurisdiction are appealable as orders made after judgment, irrespective of the provisions of section 473. In Ward v. Ward,[29a] an appeal was entertained from an order setting aside a judgment held there to be void, its invalidity arising from what the court considered a fatal defect in the summons. No question was raised as to the appealability of the order. There was no appearance for the defendant, and it was a default judgment. It is also apparent that the defendant made his motion within the time for taking an appeal from the judgment. The decision affirming the order was grounded upon the proposition that "a judgment may now be vacated on motion for any of the matters for which a writ of coram nobis or an audita querela would formerly lie." In Keybers v. McComber,[30] the particular defect in the summons held in Ward v. Ward to be fatal to the judgment was held to be merely an irregularity rendering the judgment voidable but not void. There was also a strong intimation that the summons could be amended on motion, or set aside upon direct attack—for instance, on appeal from the judgment, but that the defect was not such as to warrant a collateral attack upon the judgment. But in Clark v. Palmer,[31] an appeal was entertained, there being, as in Ward v. Ward, no question raised as to the right of appeal from the order. In People v. Dodge,[32] the court, after a review of the authorities, expressly recognized the appealability of orders made upon motions to vacate in cases where the judgment is voidable merely, upon its face, provided the motion be made within six months; and after six months only where the judgment is absolutely void on its face. The court said:

Reay v. Butler, 69 Cal. 585, 586, 11 Pac. 463; California etc. R. R. Co. v. Southern Pac. R. R. Co., 65 Cal. 295, 4 Pac. 13; Holmes v. McCleary, 63 Cal. 497.

29a 59 Cal. 139, 141.

30 67 Cal. 395, 399, 7 Pac. 838.

31 90 Cal. 504, 27 Pac. 375.

32 104 Cal. 487, 493, 38 Pac. 203.

"From a review of the record and the authorities applicable, the following conclusions are reached: . . . . 3. In all cases where a judgment is voidable and not void on its face, the error can only be corrected by an appeal, or by motion to set the same aside in the court where rendered, which motion must be made within six months after the rendition thereof, and, if denied, by an appeal from the order of denial. After the expiration of six months from its rendition, a judgment can only be set aside upon motion in cases where it is, on its face, absolutely void for want of jurisdiction of the subject matter or of the person of the defendant." It may, therefore, be considered settled that such orders are appealable, falling within the class of special orders made after judgment, though not within the purview of section 473 of the Code of Civil Procedure.

§ 501. Orders on motions for new trial.

Much is found in Part I of this treatise in reference to the views and decisions by appellate courts upon various phases of orders on motions for new trial, and other phases of the subject remain to be discussed under a subsequent head.[33]

The code expressly provides for appeals "from an order granting or refusing a new trial."[34] Similar provisions are found in a majority of the states;[35] but in several the dispo-

33 See chapter 40.

34 Cal. Code Civ. Proc., § 963, subd. 2.

35 See Spicer v. Sims (Ariz.), 57 Pac. 610, holding that under Revised Statutes, paragraph 846, providing for appeals to supreme court from "final judgments" of the district court, and paragraph 849, providing for allowance of appeal during the term at which "final judgment" was rendered, and paragraph 875, requiring the transcript to contain a copy of the "final judgment," no appeal will lie except from a final judgment, notwithstanding paragraph 593 gives the supreme court jurisdiction to review an order granting or refusing a new trial, sustaining or overruling a demurrer, etc.; Bacon v. Thornton, 16 Utah, 138, 51 Pac. 153, holding that an appeal from an order denying a motion for a new trial is ineffectual, except that the matters contained in the statement may be considered by the appellate court in the appeal from the judgment; Eastman v. Gurrey, 14 Utah, 169, 46 Pac. 828, holding that an order vacating a judgment for plaintiff in ejectment, and granting a new

sition of the motion can only be reviewed upon appeal taken from the judgment.[36]

§ 502. Same subject—Exception in case of appealable ex parte orders.

The next exception to be considered rests upon the same general reasons as that just considered. That orders made on motions to set aside or vacate appealable orders made ex parte are appealable, was decided in Pignaz v. Burnett,[37] the court, per Temple, J., saying (after a review of authorities): "As to every order finally disposing of the rights of the parties, as to any matter involved in the litigation—orders, final in the sense that the question cannot be again considered in the case—the parties affected have a right to be heard. When they are made ex parte, the right to move to vacate the order, and upon such motion to show cause against the order, is implied. In such case, the only appeal which can avail is an appeal from the order refusing to vacate. In no other way, where evidence is submitted, can the appellant present to this court his showing against the order. To say he cannot do this is to deny him his right of appeal. With the general rule laid down in the numerous cases cited by respondent I have no quarrel. Exceptions to the rule have heretofore been made, and this case falls within the reason of those exceptions. It must be admitted that this court has not always properly discriminated between the cases which are within the rule and those that are not. They will not justify us, however, in refusing to appellant a right secured to him by the constitution and the statute." In the previous case of San Jose (City of) v. Fulton[38]

trial, is not a final judgment, within Constitution, article 8, section 9, from which an appeal will lie. To same effect, White v. Pease, 15 Utah, 170, 49 Pac. 416; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479.

36 See ante, § 397.

37 119 Cal. 157, 163, 51 Pac. 48. See, also, Beach v. Spokane Ranch etc. Co., 21 Mont. 7, 52 Pac. 560. Black Hills F. & M. Co. v. Grand Island Co., 2 S. Dak. 546, 51 N. W. 324; Bostwick v. Knight, 5 Dak. 305, 40 N. W. 444.

38 45 Cal. 316, 319.

the same point was decided in favor of the right of appeal, but the right seems to have been recognized subject to a qualification that the ex parte order must have been made at the instance of a mere intruder in the case. But the court, in Pignaz v. Burnett, repudiated the distinction between ex parte orders obtained by outside persons and those obtained by adverse parties. In commenting upon a previous case in which an appeal had been sustained from an order refusing to vacate, or restrain, a writ of assistance, in which the appeal was entertained on the distinct ground that the writ was issued at the instance of a grantee of the land in controversy, the court said: "The hardship of such an application of the rule is apparent, but I fail to see that the writ is regularly issued or that it was issued at the instance of an intruder. It is not expected that the purchaser at such a sale will be the adverse party in the case. Indeed, it has been thought that he cannot purchase without special provision to that effect in the decree. If the grantee of the original purchaser is entitled to the writ at all, he is in no sense an intruder. The simple fact is, that the court found that the rule would operate unjustly and refused to enforce it. The court recognized the fact that to enforce such a rule in that case would be practically to deny an appeal, and it would often amount to the same thing if the party injured is compelled to appeal from an ex parte order where, having no opportunity to make a showing, he cannot present his case to the appellate tribunal; and frequently, too, he would have no notice of the order until it is too late to appeal. In Henly v. Hastings, supra, the defendant may have paid the judgment, and, having seen that satisfaction was duly entered, his case was ended. He was not bound to watch for further proceedings, nor was he presumed to have notice of the ex parte restoration of the judgment. The appellate jurisdiction comes from the constitution and not from the statute. The statutory procedure, however, recognizes fully the right of appeal when it provides that all orders made before judgment may be reviewed on appeal from the judgment, and all special orders after judgment are themselves appealable. The order appealed from is a special order made after judgment and comes within the terms of the statute. So, also, did the orders involved in the cases relied upon by the

respondent." The code[39] appears plainly to imply that an appeal may be taken from such orders. It provides that "an order made out of court without notice to the adverse party may be vacated or modified without notice, by the judge who made it." If a party aggrieved by the original order were confined to an appeal from that, he would usually be thereby deprived of any opportunity to have a review at all upon the merits of the application, not having had his "day in court" in order to present his side of the question.

§ 503. Orders in injunction cases.

The code allows an appeal from "an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction."[40] But there is an obvious distinction between an

[39] Cal. Code Civ. Proc., § 937.

[40] Cal. Code Civ. Proc., § 963, subd. 2. Code of Civil Procedure, section 1722, as amended February 28, 1899, providing that an appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause, why an injunction pendente lite should not be issued: Maloney v. King, 25 Mont. 256, 64 Pac. 688. See Bennett Bros. Co. v. Congdon, 20 Mont. 208, 50 Pac. 556; order granting preliminary injunction held not appealable: Huron Water Co. v. Huron (City of), 4 S. Dak. 102, 55 N. W. 759; an order sustaining a demurrer to a complaint in injunction is a final order and hence appealable, when the plaintiff refuses to plead further, though the effect of the court's ruling is the denial of a temporary injunction, since the matter determined is the sufficiency of the complaint and not the necessity for the issuance of a restraining order: Peters v. Lewis, 28 Wash. 366, 68 Pac. 869. In an action by a corporation for a mandatory injunction requiring one who had been secretary to turn over the books, papers and money belonging to that office to one claimed to have been elected his successor, an order of the court requiring defendant to turn over such property to the president pending the litigation, owing to a dispute as to who was the legally elected secretary, is a temporary mandatory injunction and appealable under Ballinger's Code, section 6500, subdivision 2: State ex rel. Byers v. Superior Court, 28 Wash. 403, 68 Pac. 865; an order denying a preliminary injunction to restrain the collection of a judgment until final hearing is not appealable: Fowle v. House, 26 Or. 587, 39 Pac. 5; an order granting a temporary injunction is not a final judgment, from which an appeal will lie under constitution, article 8, section 9: North Point Consolidated Irr. Co. v. Utah etc. Canal, 14 Utah, 155, 46 Pac. 824.

order granting a preliminary injunction and a decree granting a perpetual injunction, in other words, perpetuating a preliminary (sometimes called temporary) injunction, previously granted. After decree granting perpetual injunction, there is no existing order of injunction from which an appeal can be taken; and an appeal therefrom, taken after such decree, will be dismissed upon motion of the respondent.[41]

It would seem that, under this provision, there would be no obstacle to two appeals in the case of an injunction—the one from the order granting, and the other from the order refusing, a dissolution.

In case of an injunction granted ex parte, the party may appeal from the original order,[42] or he may move to dissolve it, and, in case of an order refusing that motion, may appeal from that order. But it seems that, where an injunction has been granted upon notice, the party must take his appeal from the order granting it, that the court has no power to entertain a subsequent motion to dissolve an injunction so granted, and that, if it does entertain and grant the motion, the order will be reversed on appeal without reference to the merits. In Natoma Water Co. v. Clarkin,[43] the court said: "It appears that, upon filing the complaint, an order was issued to the defendants, to show cause why an injunction, as prayed for, should not be issued, and upon the return of the order, cause was shown, which, being deemed insufficient, the injunction was granted. Subsequently, upon the filing of the answer, a motion for dissolution was made and sustained. In its ruling in this respect the court below erred. By the statute, the right to a temporary injunction pending the action is considered as adjudicated by the decision at the hearing upon the order to show cause. The remedy of the defendants in such case, when the right to ap-

41 Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439. To same effect, Webber v. Wilcox, 45 Cal. 301; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Jackson v. Bunnell, 113 N. Y. 220,21 N. E. 79.

42 Sullivan v. Triunfo G. & S. M. Co., 33 Cal. 385; Martin v. Travers, 7 Cal. 253; San Francisco (City and County of) v. Beidernan, 17 Cal. 461.

43 14 Cal. 543, 551. Followed in Natoma etc. Co. v. Parker, 16 Cal. 83; Hicks v. Michael, 15 Cal. 117.

ply for dissolution, upon the filing of the answer is not expressly reserved, is by appeal. The privilege of moving for dissolution, upon the filing of the answer, is limited to cases where the injunction is originally granted without notice to the adverse party." In Curtiss v. Bachman,[44] the court cited and approved the rule of the case of Natoma etc. Co. v. Parker, which followed, and adopted the rule of the case above quoted from, saying: "It is not shown by the record upon what grounds the subsequent motion to dissolve the injunction was made, or was denied by the court, but, as the preliminary injunction was granted upon notice to the defendant, and after hearing thereon, the proper course for the defendant to take was to appeal from the order, and the court in all probability denied the motion upon the ground that the defendant was not authorized to make it." It is true that there have been some statutory changes on the subject of appeals since the earlier decisions, but it is not thought that they have, in any degree or in any particular, affected the appellate practice in injunction cases. This must be true unless the same party may have two appeals in relation to the same order, the one where it is granted and the other where a motion to dissolve it is denied, for which no authority is known. A different construction is given to the Washington statutes, and it is held by the supreme court of that state that, under some circumstances, a party may appeal from an order denying his motion to vacate a temporary restraining order, and from an order granting a temporary injunction, whether he was served with notice of the motion or not.[45]

§ 504. Orders refusing to dissolve attachment.

The procurement and issuance of a writ of attachment against a party is a proceeding against him. He is afforded

44 110 Cal. 433, 439, 52 Am. St. Rep. 111, 42 Pac. 910.

45 Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213. On recovery of a judgment by an assignee for the benefit of creditors against one of the creditors, an order restraining him from collecting such judgment on the giving of a bond by the creditor to pay the excess of such judgment over the share of the creditor in the assigned estate, is appealable as a final order affecting a substantial right of the assignee: Anderson v. Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337.

no remedy, however, on the ground of mistake, accident, surprise, or inadvertence under section 473 of the California Code of Civil Procedure, and similar statutes found elsewhere, because the writ being preceded by the filing of an affidavit and bond, and issuing as of course, without the participation of the court, there is no place in the proceeding for any ground specified in said section. Moreover, statutes giving the remedy uniformly provide for the giving of a forthcoming or indemnifying bond by the party whose property is attached, thus providing a method for his relief until a hearing can be had upon the merits. In an early case,[46] it was held in the absence of any statute specifically allowing an appeal, that an order refusing to dissolve an attachment was reviewable on appeal from the judgment. This was under a provision in the Practice Act that an appeal could be taken from the district court to the supreme court from "an order made at a special term granting or refusing a new trial, or which affects a substantial right in an action or proceeding."[47] Later, the statute was changed so as to enumerate the orders from which an appeal might be taken, and neither orders granting nor orders refusing to discharge an attachment was among those specified. Nevertheless, it was held that such orders were appealable.[48] But this decision was practically overruled in a later case.[49] Soon after the last-mentioned decision, the statute was amended as it now stands in the Code of Civil Procedure, wherein appeals are expressly allowed "from an order dissolving or refusing to dissolve an attachment."[50]

46 Griswold v. Sharpe, 2 Cal. 17.

47 Laws 1851, p. 106.

48 See Taaffe v. Rosenthal, 7 Cal. 518. This case was criticised but followed as a rule of practice in Williams v. Glasgow, 1 Nev. 537.

49 Allender v. Fritts, 24 Cal. 447. Also holding that on appeal from the judgment the court cannot review such order.

50 Cal Code Civ. Proc., § 963. An order discharging a writ of attachment in respect to particular property claimed not to be liable to seizure under the writ is, in effect, an order dissolving the attachment as to such property and is appealable under section 963 of the Code of Civil Procedure: Risdon Iron etc. Works v. Citizens' Traction Co. of San Diego, 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac.

The only method to have reviewed orders on motions pertaining to attachments is by appeal direct therefrom. The rule of the earlier cases to the effect that they cannot be reviewed upon appeal from the judgment or from the order on motion for new trial has been subsequently adhered to.[51]

The supreme court of Oregon refused to follow the last-mentioned decision. It had previously adopted views on the subject in harmony with the earlier California cases;[52] and in Sheppard v. Yocum[53] followed its earlier decision and expressly dissented from the rule of Allender v. Fritts, saying: "Upon principle, it would seem, where property has been wrongfully seized by attachment, the defendant ought not to

529; an intermediate order dissolving an attachment is not appealable: Farmers' Bank of Weston v. Key, 33 Or. 443, 54 Pac. 206; appeal lies from order dissolving attachment: Red River Valley Bank v. Freeman, 1 N. Dak. 196, 46 N. W. 36; Quebe Bank v. Carroll, 1 S. Dak. 1, 44 N. W. 723. When an affidavit in attachment is traversed, and trial is had on the issues raised, an appeal cannot be taken from the judgment until final judgment is entered in the main case to which the attachment is auxiliary: Schofield v. American Val. Co., 9 N. Mex. 485, 54 Pac. 753. See, also, Machen v. Keeler (N. Mex.), 68 Pac. 937; same effect, Jung v. Myer (N. Mex.), 68 Pac. 933. Laws of 1899, page 170, sections 8, 9, specially authorize review of such orders as final judgments: Lydonville Nat. Bank v. Folsom, 10 N. Mex. 306, 62 Pac. 976; an order discharging an attachment is not appealable under Laws of 1893, page 119, section 1 (Ballinger's Code, § 6500), which specially provides for an appeal from an order refusing to discharge an attachment, but makes no provision for an appeal from an order discharging an attachment; nor is it applicable under the subdivision of that section, which permits appeal from any order affecting a substantial right by preventing a final judgment therein or discontinues the action: Spokane Dry Goods Co. v. Fritz, 26 Wash. 433, 67 Pac. 252. See, also, Jensen v. Hughes, 12 Wash. 661, 42 Pac. 127; an order dissolving an attachment may be reviewed without bringing up the whole case after final judgment, even though there is no direct statutory, provision authorizing an appeal in such cases: Smith C. D. Drug Co. v. Caspar Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

51 See Herman v. Paris, 81 Cal. 625, 22 Pac. 971, as to alleged error in refusing order to sheriff to amend writ of attachment.

52 Crawford v. Roberts, 8 Or. 325.

53 11 Or. 234, 236, 3 Pac. 824.

be deprived of the right of appeal in the event the order of the court below should be against him, otherwise he might be subjected, in some instances, to great and irreparable injury. . . . . As at present advised, we are of the opinion that an appeal will lie from an order refusing to dissolve an attachment."

It is held in Colorado that the doctrine of Allender v. Fritts is not applicable upon writs of error.[54]

The rule of the same case was affirmed in an early Washington case.[55]

§ 505. Orders changing the place of trial.

The code expressly allows appeals from orders "changing or refusing to change the place of trial."[56] But this provision does not apply to orders pertaining to the removal of causes from state to federal courts, such orders being reviewable on appeal from the final judgment.[57]

In Nevada, there is no appeal from orders on motions for change of venue.[58]

§ 506. Orders in contempt cases.

In several cases, the supreme court of California entertained appeals from orders punishing for contempt; but it is now fully settled that appeals do not lie in contempt cases. Such orders are not specified among the appealable orders in the code section providing for appeals.[59] Nor can it be classed as a "special order made after final judgment," because a proceeding for contempt has no legal relation to any other action or proceeding. It is a distinct substantive offense, below the

54 Wehle v. Kerbs, 6 Colo. 168.

55 Windt v. Bariniza, 2 Wash. 154, 26 Pac. 189.

56 Cal. Code Civ. Proc., § 963, subd. 2: Brader v. Conklin, 98 Cal. 360, 33 Pac. 211; Elliott v. Whitmore, 10 Utah, 246, 37 Pac. 461; White v. Railway Co., 5 Dak. 508, 41 N. W. 730.

57 Tripp v. Santa Rosa St. R. R., 69 Cal. 631, 11 Pac. 219.

58 Peters v. Jones (Nev.), 66 Pac. 745.

59 Cal. Pen. Code, § 1235.

grade of felony and judgment of conviction, if within the jurisdiction of the inferior court, is final and conclusive.[60]

While a contempt is a distinct offense, it is not, however, one prosecuted by indictment or information, and is, therefore, not within the appellate jurisdiction of the supreme court. The California Penal Code[61] provides that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." This provision would not, however, alone deprive the supreme court of jurisdiction to review such orders or judgments in some appropriate form,[62] if the constitution had conferred upon it appellate jurisdiction in such cases. The above provision is the same as that on the subject prior to the adoption of the codes.[63] The leading case asserting the right of appeal in contempt cases was that of People v. O'Neil,[64] where the court said: "We think the judgment appealed from is appealable. It is for money and sufficient in amount to give jurisdiction to this court. Some of the facts essential to a correct understanding of the case do not appear of record and therefore would not be brought up on certiorari, but are properly presented by a statement on appeal. We think an appeal in cases of this character, when facts dehors the record may be examined, is the appropriate remedy. We are also of opinion that the judgment, though purporting to be for a contempt, is appealable and is subject to review on the facts presented by this record. We are not called upon in this case to decide whether a judgment for contempt, rendered by a court having jurisdiction to render it, may, in any case, be reviewed for mere error. But it is clear that the question of jurisdiction is always open to review. . . . . It is clear, therefore, that in such cases, the question of jurisdiction is subject to review in the appellate court."

60 See Phillips v. Webb, 12 Nev. 158; Ex parte Crittenden, 62 Cal. 531.

61 Cal. Pen. Code, § 1222.

62 See Huerstal v. Muir, 62 Cal. 479, 481.

63 See Laws 1851, p. 128.

64 47 Cal. 109, citing Adams v. Haskell, 6 Cal. 318; Ex parte Cohen, 6 Cal. 319; Ex parte Rowe, 7 Cal. 181, 185; Batchelder v. Moore, 42 Cal. 413.

It will be observed that even in this case the exercise of the power to review was carefully limited to questions touching the jurisdiction of the lower court; and, in a subsequent case, the limitation was enforced to the extent of preventing a review and resulting in the dismissal of an appeal.[65] In Huerstal v. Muir,[66] the court hesitated to overrule People v. O'Neil, and after reciting the gist of the decision, said: "This section is not intended to declare the absurdity that such judgments, when rendered without jurisdiction, may not be annulled by a proper proceeding. To give effect to its language, judgments and orders in cases of contempt must be held to be 'final and conclusive,' in the sense that they are not appealable." But, immediately, the court advanced a course of sound reasoning justifying the decisions made absolutely in subsequent cases, that, regardless of whatever other methods of review existed, no appeal could be entertained in contempt cases, under any circumstances, quoting section 1222 of the Code of Civil Procedure, and remarking: "We find no authority for the position that an order adjudging one guilty of contempt may be appealed from simply on the ground that the record shows want of jurisdiction to render the judgment. It is admitted on all sides that, if the lower court has jurisdiction, such an order is not appealable. The appellate jurisdiction of this court cannot depend upon the presence or absence of jurisdiction in the court below. We have jurisdiction to hear appeals in all cases of contempt judgment—when the question presented by the record is simply as to the jurisdiction of the lower court—or in none; since in all such cases, when we pass upon the jurisdiction of the court below, we pass upon the merits of the appeal." And further on the court said: "We are not inclined to extend the authority of that decision so as that it shall include any case differing in its circumstances, or not limited by the conditions therein considered as material. In the case now before us, no fine of three hundred dollars was imposed by the court below; neither does it appear that there are facts dehors the record which could only be brought up by statement or bill of exceptions."

65 Larrabee v. Selby, 52 Cal. 506.

66 62 Cal. 478.

It will be noted that, in People v. O'Neil, the appellate jurisdiction was asserted not only upon the ground that a jurisdictional question was involved, but upon the additional ground that the pecuniary amount was within the jurisdiction of the district court. And it seems that the latter ground was considered by the court to be sufficient to sustain the appellate jurisdiction in Huerstal v. Muir. But in Tyler v. Connolly,[67] the proposition that any such test as the pecuniary amount of the fine could be considered was expressly repudiated, the court, after quoting section 4 of article 6 of the constitution, saying: "It is argued that because the judgment against Tyler exceeds three hundred dollars, that the appeal is given by the constitution. But the constitution does not give an appeal in all cases where the judgment exceeds three hundred dollars; it gives it only when the demand, exclusive of interest, exceed that sum. There was no demand for any sum in the proceeding against Tyler. The demand made appears in the pleadings—either in the complaint or answer. We know of no demand for a sum of money in a proceeding for a contempt. The law does not require or authorize such demand to be made. It would be most unusual to make it; and if made, it would be entirely unnecessary and without avail. The contention on the ground stated cannot, in our opinion, be maintained. It has been held by this court that a proceeding for contempt is a criminal case. But as it is not prosecuted by indictment or information, its character as a criminal case furnishes no ground for an appeal. The constitution expressly limits appeals to criminal cases prosecuted in the mode above stated. We find no warrant in the constitution for an appeal in a proceeding for contempt. Conceding that the legislature may confer appellate jurisdiction on this court in cases not provided for in the constitution, we have been referred to no statute giving the right to appeal from a judgment in a contempt case." Referring to People v. O'Neil, the court remarked that it thought the court mistook the law in holding that the judgment therein was appealable, and added that no authority was referred to in the opinion in that case, nor any law, constitutional or statutory, granting the right of appeal in such case

[67] 65 Cal. 28, 2 Pac. 414.

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referred to or any cited.[68] Tyler v. Connolly has been uniformly followed in California,[69] and in some other states having similar constitutional and statutory provisions. In Phillips v. Welch,[70] Justice Beatty, at the close of a learned opinion containing a view of authorities, repudiated to the doctrine of People v. O'Neil, and the court held that it had no jurisdiction of an appeal taken in contempt cases. This decision, it should be stated, antedates that of Huerstal v. Muir.

It seems that under the judicial systems of Colorado, North Dakota and Utah, appeals or writs of error in contempt cases are, under some circumstances entertained.[71]

But generally, since the remedy by appeal is a substitute for writ of error, the same objections lie against a resort to the latter to obtain reviews of orders and judgments fining or committing for contempt as against the former. It was held in South Dakota, however, that a resort to the writ of error was an appropriate method.[72]

§ 507. Supervisory power limited to use of prerogative writs in contempt cases.

It would, however, be a reproach upon any judicial system if no supervision or correction of the acts of inferior courts in contempt cases could be had in any form; and it is well settled that certiorari habeas corpus and prohibition are appropriate remedies for reviewing cases of arbitrary and ultra-jurisdictional orders and judgments, each having its place according to the ne-

68 Referring to what was said in Ex parte Hollis, 59 Cal. 408, the court said that it was mere dictum.

69 See Sanchez v. Newman, 70 Cal. 210, 11 Pac. 645; In re Varice, 88 Cal. 262, 26 Pac. 101; Ex parte Clancy, 90 Cal. 553, 27 Pac. 411; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393. Same ruling in State ex rel. etc. v. Young, 6 S. Dak. 406, 61 N. W. 165. Previously held otherwise in same state: State v. Knight, 3 S. Dak. 516, 44 Am. St. Rep. 815, 54 N. W. 412.

70 11 Nev. 187, 193.

71 See Cooper v. People, 13 Colo. 355, 22 Pac. 790; State v. Crum, 7 N. Dak. 299, 74 N. W. 992; Noble (Tp. of) v. Aasen., 10 N. Dak. 264, 86 N. W. 742; Snow v. Snow, 13 Utah, 23, 43 Pac. 620.

72 State v. Knight, 3 S. Dak. 516, 44 Am. St. Rep. 815, 54 N. W. 412.

cessities and exigencies of the case. The power to review such judicial acts is part of the appellate jurisdiction conferred upon appellate tribunals in some of the states, and belongs to the general supervisory powers of such courts in others. These writs are generally held to bring up for review only jurisdictional questions. As to what are jurisdictional questions and how far the inquiry may extend in deciding them is about the only question upon which there is any important conflict of authority.

Of these original remedies in contempt cases, certiorari and habeas corpus are most frequently resorted to, though occasionally prohibition can be made available by the party about to be proceeded against.

Persons committed for contempt have been in numerous instances discharged on habeas corpus, on the ground that, in the particular circumstances, the court had no jurisdiction to adjudge the contempts.[73] So if it appear that a judicial officer is about to exceed his jurisdiction by trying a party for a contempt without legal power so to do, the party threatened may stay the proceeding by prohibition.[74]

If a court actually adjudges a party guilty without jurisdiction, his judgment may be annulled by certiorari (writ of review).[75]

The remedy of the party injured or about to be injured is in each case ample by a resort to one of these remedies—either the common law or the statutory form.

§ 508. Right of persons not original parties, but affected by orders.

It sometimes occurs that an appealable order is made which is prejudicial to one not a party to the action. In such case,

73 Instances—Ex parte Cohen, 6 Cal. 318, 319; Ex parte Rowe, 7 Cal. 181; In re Spencer, 82 Cal. 110, 23 Pac. 37; Ex parte Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.

74 Instance—People v. Wright, 27 Cal. 151.

75 Instances—Batchelder v. Moore, 42 Cal. 413; Ex parte Smith, 53 Cal. 204; Ex parte Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227; Young v. Cannon, 2 Utah, 560; Maxwell v. Rives, 11 Nev. 213; In re MacKnight, 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.

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the party injured by the original order cannot appeal because none but parties of record at the time an order is made can appeal. Before he can be heard in any form he must take steps to make himself a party of record by his motion to set aside the order. From the order made on his motion he may appeal. In People v. Grant[76] the court said: "In no other way could he become a party upon the record so as to enable him to support an appeal. The cases in which we have held that the appeal should be taken from the order itself, as originally entered, and not from a subsequent order refusing to set aside, are cases in which the party might have prosecuted an appeal from the original order. We have never held that anyone was concluded by the lapse of sixty days from the entry of an order from which he had never had an opportunity to bring an appeal. Had Tormey appealed directly from the order of May 13, 1872, the appeal must have been dismissed here, upon the ground that he was not a party upon the record, and unless he could be permitted to move in the court below to set that order aside, he would be left without remedy." On the rule and reasoning of this case an appeal was entertained from an order refusing leave to parties seeking to intervene in an action.[77] But it is now settled that no appeal lies from an order on an application to intervene, and that the error, if any, in such order can only be reviewed on appeal from the judgment.[78]

It is necessary, however, that the appeal be taken by a party against whom the original order operates or purports to operate. In Miller v. Bate[79] the court said: "And as no moving papers are to be found in it, the order appealed from must have been made upon an ex parte application against the defendant in the action. That being the case, the order is inoperative against any other person than the defendant; and as the appellants are not aggrieved by an order to which they were not made parties, and as the order is inoperative against them, they have no standing on appeal, and their appeal must be dismissed."

76 45 Cal. 97, 99. To same effect, Green v. Hebbard, 95 Cal. 39, 41, 30 Pac. 202; Pignaz v. Burnett, 119 Cal. 157, 163, 51 Pac. 48.

77 Coburn v. Smart, 53 Cal. 742, 745.

78 See ante, §§ 480-482.

79 56 Cal. 135.

§ 509. Right of party as against intruder into action.

The same reason for allowing an outside party against whom an order or proceeding is made or taken to appeal from an order refusing to vacate supports an appeal by a party to an action on his motion to vacate such order or proceeding, made on application of, or taken by, an intruder into the action and without notice to him, provided, of course, the original order be itself one from which an appeal could ordinarily be taken. in City of San Jose v. Fulton,[80] the court, after referring to the general rule, said: "But the rule applies only to such orders or proceedings as are regularly had. It does not apply to an ex parte order taken at the instance of a mere intruder into the case—for, in the absence of notice of the application actually given, a party is not to be held to knowledge of the entry of an order obtained by one who is not already recognized adversary in the case. It would be unreasonable to impute to him notice of the steps taken by a mere stranger to the litigation resulting in an order injurious to his rights, and a knowledge of which may not, in fact, reach him until too late to take his appeal."

To be appealable the order which is made must be on a motion to vacate an original order which is itself appealable.[81]

§ 510. Appeal may be taken from void order in due form.

An order made in due form is appealable, though void.[82] The same reasons exist for allowing an appeal from such an order as in the case of a void judgment in due form.[83] Accordingly, it was held that an appeal might be maintained from a

80 45 Cal. 316, 319.

81 Estate of Keane, 56 Cal. 409; Harper v. Hildreth, 99 Cal. 265, 269, 33 Pac. 1103, holding that orders dismissing an action, denying leave to file an amended and supplemental complaint, and to introduce certain evidence, being nonappealable, an order denying plaintiff's motion to vacate these orders was not appealable. They might be reviewed, however, on appeal from the judgment.

82 Bond v. Pacheco, 30 Cal. 530.

83 See ante, § 490.

void nunc pro tunc order amending an original decree entered on default.[84]

84 Hoover v. Hoover, 39 Or. 456, 65 Pac. 796. See, also, Stites v. McGee, 37 Or. 574, 577, 61 Pac. 1129. In this case the court said: In this case the court said: "The court below, therefore, had no power or authority to set aside or vacate the decree on motion after the expiration of the term, and its order attempting to do so is consequently void and reviewable on appeal: Deering v. Quivey, 26 Or. 556, 38 Pac. 710."

CHAPTER 26.

SUBJECTS OF APPEAL—ORDERS IN PROBATE.

§ 511. In probate matters—General view—Statutory provisions.
§ 512. Rule that appeal must be taken from judgment or order, and not from order on motion to vacate.
§ 513. A judgment or order against, or in favor of, directing the partition, sale, or conveyance of real property.
§ 514. Granting, refusing to grant, revoking, or refusing to revoke letters testamentary or of administration, or of guardianship.
§ 515. Order settling an account of an executor, administrator, or guardian, or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof.
§ 516. Judgment or order for the payment of a debt, or claim, or legacy, or distributive share.

§ 511. In probate matters—General view—Statutory provisions.

The first subdivision of section 963 of the California Code of Civil Procedure, providing from what judicial acts an appeal may be taken, has been already quoted, but for convenience and a better understanding of the discussion which follows, that will be again quoted in connection with the third subdivision relating to appeals in probate matters, as follows: "An appeal may be taken to the supreme court from a superior court in the following cases: 1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court. . . . . 3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale,

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or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing, the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead."

It will be observed, by reference to the whole section, that the first two subdivisions distinguish between judgments and orders, while in the third subdivision they are mentioned in conjunction, and the provisions thereof apply to them indiscriminately.[1]

The definition of a judgment[2] is as applicable to the judgments in a probate proceeding as in any action or other kind of proceeding.

The provisions of the California statutes relating to appeals in probate matters have been subjected to frequent changes. At first no provision whatever was made for appeals therein, but provision was made for appeals from probate to district courts. In Reed v. McCormick,[3] that provision was held unconstitutional. In 1855,[4] section 297 of the Practice Act was amended so as to allow appeals to the supreme court from probate courts in several matters, but with the limitation that to warrant such appeal the matters in dispute must exceed two hundred dollars. In 1861,[5] the right of appeal from orders granting or refusing to grant letters of guardianship was added by amendment. The Code of Civil Procedure as first adopted contained the provision relating to appeals in probate matters

1 In the absence of a suggestion of a better reason for the arrangement made by the codifiers, it is suggested that it may have been with the object of making it more convenient to fix the same period within which appeals should be taken from judgments and orders in probate court, which is done by section 1715 of the California Code of Civil Procedure in these words: "The appeal must be taken within sixty days after the order, decree or judgment is entered."

2 Cal. Code Civ. Proc., § 577.

3 4 Cal. 342.

4 Laws, 1855, p. 301.

5 Laws, 1861, p. 654.

in a separate section,[6] extending the right of appeal to several additional orders in probate. Further amendments of no great importance were made in 1874 and 1878. In 1880, after the adoption of the new constitution in 1879, abolishing probate courts, and instituting superior courts as the only courts inferior to the supreme court having general jurisdiction, the separate section containing the provision relating to appeals from probate orders was omitted, and the entire matter, with no material change in its phraseology, was constituted the third subdivision of section 963 of the same code. In 1897, the first clause of said subdivision was changed to read: "From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship."[7] In 1901 the words "or refusing to revoke" were inserted by amendment in the second clause, and the words "or appraisers" were inserted after the word "appraiser" in the last clause.[8]

The provision is so clear that few cases have arisen under it which imposed upon the courts tasks of construction. In Estate of Hughston[9] it was held that an order or judgment refusing to revoke the probate of a will made prior to the amendment of February 28, 1901, relative to that subject, though not entered until after its passage, was not appealable thereunder, and that appeals taken therefrom must be dismissed.

With reference to the right of appeal to the supreme court authorized by the constitution and provided by statutes, these are liberally construed.[10] But such appeals lie only from

6 Cal. Code Civ. Proc., § 969.

7 Stats. & Amendments, 1897, p. 209.

8 Stats. and Amendments, 1901, p. 85.

9 133 Cal. 321, 65 Pac. 742, 1039. On the first point, that such orders were not appealable in the absence of the amendment, see Estate of Winslow, 128 Cal. 311, 60 Pac. 931. On the second point, see Melde v. Reynolds, 120 Cal. 235, 52 Pac. 491.

10 Estate of Scott, 124 Cal. 671, 57 Pac. 654. In this case the court said: "We are not inclined to dismiss an appeal upon grounds or for defects in procedure that are purely technical, when it is apparent that the appellant has complied with the substantial requirements for perfecting his appeal, and is prosecuting the same with diligence and in good faith. The right of an appeal to this

such orders and decrees as are enumerated in section 963, subdivision 3, of the Code of Civil Procedure; and the provisions of subdivision 2 of that section, relative to appeals from orders made after judgment, are not applicable to probate proceed-

court from the superior court is given by the constitution in all such probate matters as may be provided by law, and statutes making such provision, and regulating the procedure therefor, should be liberally construed." The parties had filed in the lower court a stipulation to the effect that the order appealed from had been entered at a certain date which was later than the actual date of the entry of the order. The supreme court held that the appellant was not prevented by the stipulation from showing in support of his appeal the actual date of entry, saying: "Annexed to the affidavit of the moving party herein is a copy of a stipulation filed in the court below, November 21, 1898, between the attorneys for some of the parties to the proceeding therein, including the contestant and the proponents of the will, as follows: 'Some confusion having arisen in the above-entitled cause as to the date of the actual entry of the order admitting the will to probate and appointing the executors, which said orders were signed and filed in this court on the twelfth day of September, 1898, for the purpose of settling said date so that the same shall be fixed and certain, it is hereby stipulated for all purposes that the said orders were actually entered as provided by law on the same date the same were filed, to wit, on the twelfth day of September, 1898'; and the respondents urge that, by reason of this stipulation, the appellant is precluded from contending that the appeal was within sixty days after the entry of the order. The time within which the appellate jurisdiction of this court may be invoked is determined by statute, and not by a stipulation of the parties. The code provides that an appeal may be taken from an order admitting a will to probate 'within sixty days after its entry,' and it has been held that their rights in respect to an appeal are determined by the date of its 'actual entry': Coon v. United Order of Honor, 76 Cal. 354, 18 Pac. 384. The action of the superior court does not become definite and certain until it is entered at length in its records. Prior to that time it is in the breast of the judge, and, until it shall be so entered, his decision may be changed from time to time according to his views. It is only when his decision has become the judgment of the court, and thus passed beyond his recall that the appellate jurisdiction of this court may be invoked: Brady v. Burke, 90 Cal. 1, 27 Pac. 52. If parties could, by their stipulation, bring before this court for review a decision of the superior court before it had been entered in that court, it would be within their power to invoke our action upon moot questions, and we might be called upon to affirm or reverse

ings.[11] It is the evident policy of the legislation on the subject to so limit appeals, subjectively, and as to time, as to curtail dilatory proceedings in the settlement of estates.[12]

§ 512. Rule that appeal must be taken from judgment or order and not from order on motion to vacate.

It will be observed that the section allows appeals from two orders which are in effect refusals to vacate former judgments or orders—namely, orders refusing to revoke letters testamentary, and orders refusing to revoke the probate of wills. With these exceptions, the rule that the appeal must be taken from the judgment or order itself, and not from an order on subsequent motion to vacate it, is strictly adhered to. In Estate of Hickey,[13] the court said: "This appeal is taken by the administrator from an order vacating a prior order settling his final account. In an addendum to respondent's brief the point is made that the order is not appealable, and that the appeal should therefore be dismissed. It was expressly held that "appeals in probate proceedings lie only from such orders and decrees as are enumerated in section 963, subdivision 3, of the Code of Civil Procedure." That the order here appealed from

orders that had never been made, or judgments that had never been entered. It does not appear for what purpose the above stipulation was entered into, the only recital therein being the 'confusion' that had arisen as to the date of the actual entry of the order. There does not, however, appear to have been occasion for any confusion, as the date of filing and the date of entry are distinct and separate acts, and performed at different times. In fact, the date of its entry would seem to be as important a part of the record as the entry itself and as readily ascertained (Code Civ. Proc., § 672; see, also, Menzies v. Watson, 105 Cal. 109, 38 Pac. 641); but, whatever may have been the cause of the confusion, we hold that the stipulation did not have the effect to deprive the contestant of the right to review the action of the superior court, or to change the time from which his right of appeal should begin to run."

11 Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393. See, also, Estate of Walkerly, 94 Cal. 352, 29 Pac. 719; Estate of Moore, 86 Cal. 58, 24 Pac. 816; Estate of Ohm, 82 Cal. 160, 22 Pac. 927.

12 See Leach v. Pierce, 93 Cal. 614, 29 Cal. 235.

13 121 Cal. 378, 53 Pac. 818. See, also, Estate of Wittemeier, 118 Cal. 255, 50 Pac. 393.

is not enumerated among the appealable orders there provided for is clear. This disposition of the appeal is the less to be regretted, since, when the court again settles the administrator's account, if he should then feel aggrieved, he can appeal from the order then made settling it. In Estate of Bauquier,[14] the appeal was from an order denying a new trial on a motion regularly prosecuted in a case within the court's jurisdiction to grant a new trial. The supreme court has in subsequent cases had occasion to distinguish that case from others in which either

14 88 Cal. 302, 26 Pac. 178, 532. In passing upon the petition for rehearing in this case, the court explained former decisions and distinguished between orders on motions to vacate and on motions for new trial as follows: "A rehearing is asked in this case, upon the ground that the court in deciding that the order denying a new trial is an appealable order disregarded its former decisions upon the same point. In Estate of Wiard, 83 Cal. 619, 24 Pac. 45, the court used the following language: 'Subdivision 3 of section 963 of the Code of Civil Procedure, enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings, and an order refusing to vacate a decree of distribution and settlement of final account is not one of them.' In this case, after the entry of a decree of distribution, the contestant gave notice of her intention to move the court 'to vacate and set aside the decree of distribution, and for a new trial in the matter of said petition for distribution. The motion, when brought on for hearing, was denied, and an appeal was taken from that order, but the record brought here did not contain any statement of the case or bill of exceptions to enable this court to pass upon that portion of the order denying the motion for a new trial, and the appeal was dismissed. In support of what is said above in dismissing the appeal, the court cited Estate of Calahan, 60 Cal. 232, and Estate of Lutz, 67 Cal. 457, 8 Pac. 39. In Estate of Calahan, 60 Cal. 232, an order had been made in 1875, purporting to settle the final account of the executor, and discharge him from his trust. In 1880, upon a petition therefor, the superior court made an order vacating the order made in 1875, and an appeal therefrom was dismissed by this court upon the ground that such order was not appealable. In Estate of Lutz, 67 Cal. 457, 8 Pac. 39, an order settling the final account of the executor and distributing the estate was made in 1881, and a petition filed in 1884 to vacate that order was denied by the superior court. An appeal from this order was dismissed by this court, upon the ground that it was not an appealable order. In each of the foregoing cases the court was simply called upon to determine whether an order vacating or refusing to vacate a decree of distribu-

without resorting to regular proceedings for a new trial, or where such proceeding was not provided for, parties attempted to maintain appeals from orders refusing to vacate orders in probate. In Estate of Walkerly,[15] one of the cases above referred to, the court said: "The order appealed from is clearly not appealable. The general rule is well established that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in subdivision 3 of section 963 of the Code of Civil Procedure; and the order appealed from in the case at bar is not one of those there mentioned." After referring to Estate of Bauquier, as a modification of the general rule, the court proceeded: "In that case there was a regular contest and trial over the question of issuing letters testamentary to an executrix, and an appeal to this court from an order denying a new trial; and this court merely held that, 'in all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its order thereon.' But as in the case at bar the attempted appeal is not from an order made on a motion for a new trial, the Bauquier case does not apply. And that the order here appealed from is not a 'special order made after trial judgment' within the meaning of the second subdivision of section 963 is also settled by the authorities first above cited. If it were otherwise, the third subdivision of said section could be entirely disregarded by simply assuming that

tion is an appealable order, and its language must be construed in connection with the matter which it decided. Taken literally, the language of the court in each of those cases would imply that an appeal does not lie from an order made in probate proceedings granting or refusing a new trial, but as such construction is in direct conflict with the expressed language of the statute, it must be disregarded." Under express code provision in Montana, an appeal lies from an order denying a new trial in proceedings for the distribution of a decedent's estate: In re Davis' Estate (Mont.), 70 Pac. 721.

15 94 Cal. 352, 29 Pac. 719. See, also, Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Calahan, 60 Cal. 232; Estate of Hickey, 121 Cal. 378, 53 Pac. 818, abortive appeal from order vacating; Estate of Dean, 62 Cal. 613; Estate of Lutz, 67 Cal. 457, 8 Pac. 39; Estate of Smith, 98 Cal. 636, 33 Pac. 744; Iversen v. Superior Court, 115 Cal. 27, 46 Pac. 817.

a probate order not therein mentioned was a final judgment, and that an order refusing to vacate it was a 'special order made after final judgment.'" In Estate of Lutz,[16] an order settling the final account of the executor and distributing the estate was made in 1881, and a petition filed in 1884 to vacate that order was denied by the superior court. An appeal from this order was dismissed by the supreme court, upon the ground that it was not an appealable order. There can be no doubt of the correctness of the decision, it being in line with prior and subsequent decisions. The court was simply called upon to determine whether an order vacating or refusing to vacate a decree of distribution was an appealable order. But the language of the court in that, as in a prior case,[17] was too broad, and was well calculated to mislead, because implying that an appeal does not lie from an order made in probate proceedings granting or refusing a new trial. It also ignores all cases of orders resulting from mistake, inadvertence, etc., covered by the section of the code on the subject.[18]

§ 513. A judgment or order against or in favor of directing the partition sale, or conveyance of real property.

In the same section just noticed, appeals are provided for from a judgment or order "against or in favor of directing the partition, sale or conveyance of real property" several appeals have been entertained under that provision.[19]

In several other states, with the same constitutional provisions as are found in California, the statutes simply provide that appeals shall lie from final orders and decrees of the

16 67 Cal. 457, 8 Pac. 39.

17 Estate of Calahan, 60 Cal. 232.

18 Cal. Code Civ. Proc., § 473; ante, § 500.

19 See Estate of Corwin, 61 Cal. 160, appeal from order refusing to direct conveyance of real estate by an executor under section 1597 et seq. of the Code of Civil Procedure; Estate of McConnell, 74 Cal. 217, 15 Pac. 746, order made in the proceeding for the settlement of an estate, authorizing an executor to mortgage the lands of the estate. But an order compelling administratrix to allow her name to be used by a creditor of the estate, in a suit to set aside a conveyance of the decedent as having been made to defraud his creditors is not appealable: Estate of Ohm, 82 Cal. 160, 22 Pac. 927.

court in administering estates.[20] Under such provisions it was held that an order refusing to confirm a sale of a decedent's personal property constituted a final order, and was appealable.[21]

§ 514. Granting, refusing to grant, revoking or refusing to revoke, letters testamentary or of administration, or of guardianship.

The same section provides for an appeal from a judgments or order "granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship." Many appeals have been taken and prosecuted under this provision without question. But, prior to the amendment of 1897, noted in the first section of this chapter, there were no appeals from orders refusing to revoke orders granting letters or making appointments.[22]

§ 515. Order settling an account of an executor, administrator, or guardian, or refusing, allowing or directing the distribution or partition of an estate or any part thereof.

Appellate jurisdiction of orders within the above enumeration, found in the same section, have been so unquestionably entertained as to give little room for construction. An interlocutory order settling the account of an administrator is appealable, and brings up for review all the proceedings leading up to it, including the evidence upon which it was based, though the appeal be not taken within sixty days after the signing and filing of the findings and decree.[23] So an appeal lies, under the express terms of the section, from an order directing a partial distribution.[24] But the right of appeal is not extended beyond

20 See Utah Const., art. 8, § 9; Utah Rev. Stats., § 3300.

21 In re Auerbach's Estate, 23 Utah, 529, 65 Pac. 488.

22 In re Get Young Guardianship, 90 Cal. 77, 27 Pac, 158. See, also, Estate of Moore, 86 Cal. 58, 24 Pac. 816. See, also, Estate of Moore, 68 Cal. 394, 9 Pac. 315, holding that an appeal did not lie from an order refusing to remove an administrator.

23 Estate of Rose, 80 Cal. 166, 22 Pac. 86.

24 Estate of Kelly, 63 Cal. 106, See, also, Estate of Mitchell, 121 Cal. 391, 53 Pac. 810, holding also that where there was partial distribution on petition of legatees, the executor could maintain an appeal.

the evident intent and purview of the statute. Thus it was held that no appeal could be maintained from an order declaring who was entitled to a legacy in advance of a final judgment or order of distribution of the money which was the subject of the legacy;[25] nor from an order refusing to compel the clerk of the court to pay over funds in his hands belonging to an estate to a person who had been the special administrator of the estate, in satisfaction of a claim which had been allowed him for his services as such administrator;[26] nor from an order refusing to suspend or postpone a decree of final distribution;[27] nor from an order directing an administrator to turn over certain assets to his successor, on resignation or removal.[28]

§ 516. Judgment or order for the payment of a debt, or claim, or legacy, or distributive share.

The benefit of appeals from judgments and orders found in the section above named have been often entertained. Thus an order directing the payment of attorney's fees to the attorney of an executor is appealable.[29] And the demand of an attorney for services rendered an administrator during the progress of the settlement of the estate of a decedent, which is presented to the administrator and allowed and approved by the probate court, and ordered to be paid out of the estate in the due course of administration, although not technically a "claim" against the estate within the meaning of section 963 of the Code of Civil Procedure, will be treated as such, and the order directing the administrator to pay it is appealable.[30] And an order directing a payment of a preferred claim is appealable, notwithstanding a previous adjudication that it is a preferred claim, from which no appeal has been taken, and where the estate is insolvent, and such order is made before the amount

25 Estate of Casement, 78 Cal. 136, 20 Pac. 362.

26 Estate of Paten, 72 Cal. 576, 14 Pac. 209.

27 Estate of Burdick, 112 Cal. 387, 44 Pac. 734.

28 In re Barker's Estate, 26 Mont. 279, 67 Pac. 941.

29 Estate of Kruger, 123 Cal. 391, 55 Pac. 1056; Leach v. Pierce, 93 Cal. 627, 29 Pac. 239, case of attorney appointed to represent minor and nonresident heirs.

30 Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35.

of the distributable estate is ascertained, and the accounts of the administrator settled, the administrator has a right of appeal therefrom, as being a party aggrieved by the premature order.[31] But where it was provided by a code provision that if a claim against an estate was rejected the holder must bring suit within a certain time or be barred, this was held to provide an exclusive remedy and that an order disallowing the claim was not appealable under provisions similar to those of California.[32]

31 Estate of Smith, 117 Cal. 505, 49 Pac. 456.

32 In re Barker's Estate, 26 Mont. 279, 67 Pac. 941; Mont. Code Civ. Proc., § 1722; Mont. Sess. Laws 1899, p. 146.

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CHAPTER 27.

SUBJECTS OF APPEAL—SPECIAL ORDERS AFTER FINAL JUDGMENT.

§ 517. General views—Meaning of term "special."
§ 518. As to relation of special order to the judgment.
§ 519. Orders pertaining to costs—Considered with relation to entry of judgment.
§ 520. Orders pertaining to costs—Considered with reference to amount as an element of appellate jurisdiction.
§ 521. Further illustrations.

§ 517. General views—Meaning of term "special."

In addition to orders made prior to judgment, which are specified in the statute, the right of appeal is extended to "any special order made after final judgment." It will be noted that while care was taken to designate the orders of which there might be an independent review in the appellate court, if made before judgment, leaving all orders not so designated to be reviewed on appeal from the judgment, yet with respect to orders made after judgment, no limitation was imposed, the statute only requiring that the order be "special." Just what this word was intended to mean has never been definitely determined. The act of the court, or judge, in making the order is ancillary to the jurisdiction of the court in rendering the judgment. Consequently, it is none the less a "special order entered after final judgment" when made by the judge of another court, authorized by law to take jurisdiction of the proceedings.[1] But the order, to be entitled to such designation, may not cover a matter which might be reviewed on appeal

1 Wells, Fargo & Co. v. Anthony, 35 Cal. 696. In this case the court very clearly demonstrates the soundness of its conclusion.

from the judgment.[2] Since the court loses jurisdiction upon the rendition and entry of judgment, except for the settlement of bills of exceptions, etc., pertaining to appeals, it would be difficult to find place for a distinction between a special and a general order, and in practice it has never been found necessary to attach any particular significance to this word. The same reasons for allowing an appeal from a "special" order made after judgment would apply to all others—namely, unless an appeal be permitted direct from the order itself no opportunity is afforded for revision. An order on motion for new trial is one made after judgment, but that is specially provided for.

[2] Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758. See, also, Greiss v. State Investment Ins. Co., 93 Cal. 411, 28 Pac. 1041. In the first case the facts and view of the court upon the motion to dismiss, are as follows: "Judgment was entered herein in favor of the plaintiff, February 18, 1901, August 9, 1901, the defendant moved the court for an order setting aside the judgment, on the ground that no findings or conclusions of law had been made or filed in the cause, the same not having been waived. An order denying this motion was made and entered by the court, August 14, 1901. From this order the present appeal has been taken. The facts presented herein are within the rule declared in Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; and upon the authority of those cases the motion must be granted." The court then proceeded to distinguish between orders reviewable on appeal from the judgment and those not so reviewable, but which come within the definition of "special orders made after final judgment," as follows: "An examination of the cases cited by the appellant in opposition to the motion will show that in nearly all of them the appeal was from an order vacating and setting aside the judgment, whereby the effect of the judgment was destroyed by an order subsequent thereto, and in which the action of the court could be reviewed only upon an appeal from this order, inasmuch as, after the order had been made, there was no judgment from which an appeal could be taken. In one or two of the cases the facts upon which it was sought to vacate the judgment were extraneous to the trial of the cause, and could not have been reviewed upon an appeal from the judgment. In none of these cases so cited is the effect of the above authorities impaired, or the correctness of the rule there laid down questioned. In the present case, however, the grounds upon which the defendant sought to have the judgment vacated existed before the judgment was entered, and would have been available upon an appeal from the judgment." The second case is one in which the court makes special

No reason is given in the code, nor does any elsewhere appear, for the use of the word "special" in this connection. In the absence of any better reason, it is here suggested that the term was used to distinguish other such orders from the order on motion for new trial, the latter being after judgment but being of a general rather than of a special character affecting the entire force and effect of the judgment. In South Dakota, however, an order on motion for new trial, made before judgment is reviewable on appeal from the judgment, as an intermediate order affecting the judgment; but if made after judgment an appeal may be taken from it, as in case of other special orders made after judgment.[3]

The provision for appeals from "special orders made after final judgment" has but a limited, if any, application in probate matters. In Estate of Wittemeier,[4] the court denied the appealability of any such orders in these words: "Appeals in probate proceedings lie only from such orders and decrees as are enumerated in section 963, subdivision 3, of the Code of Civil Procedure. The provisions of subdivision 2 of section 963, relative to appeals from orders made after final judgment, are not applicable to probate proceedings." But as previously shown,[5] certain orders which would otherwise come within the category of such orders are expressly made appealable by the

reference to orders made in connection with proceedings for new trial and says: "The refusal to dismiss a motion for a new trial does not finally dispose of the motion itself, and until some order is made by the trial court which has the effect to either grant or deny the motion for a new trial, neither party can be said to be aggrieved, and there is nothing to appeal from. The adverse party has the right to resist a motion for a new trial by a counter-motion to dismiss, and if overruled, he may preserve his exception in the bill of exceptions, which becomes part of the record upon appeal from the final order of the court, and of which he may avail himself upon such appeal; but the refusal of the court to dismiss the motion for a new trial is not itself the subject of a distinct appeal, nor can the exception to such a ruling be considered, unless it is made part of the record upon appeal from an order which finally disposes of the motion for a new trial."

3 Granger v. Roll, 6 S. Dak. 611, 62 N. W. 970.

4 118 Cal. 255, 50 Pac. 393.

5 Ante, § 517.

code. And the dissenting opinion of the chief justice in the Wittemeier case, wherein he contends that special orders after final judgment in special proceedings are appealable generally under the provisions of the code, deserves serious consideration.

§ 518. As to relation of special order to the judgment.

It was at one time insisted that the orders made after judgment from which an appeal could be taken meant those in direct line of the judgment, and did not mean such as were made in the proceedings incidental to, and in preparation for, an appeal and motion for new trial; and it was held in several cases that an order striking out a statement on motion for new trial was not appealable.[6] But in Calderwood v. Peyser,[7] a different conclusion was reached, and the latter decision has been since followed.[8] In that case, after noticing former decisions, Wallace, J., delivering the opinion, said: "The general doctrine of those cases is, that 'any special order made after final judgment,' to become the subject of an appeal here must have followed the judgment, not in mere point of time of its entry but that the order to be reviewed must, in some way have depended upon the judgment itself, or have followed it in logical sequence; that it must have 'followed the judgment in the same line of proceedings,' etc. I am unable, however, to discover any reason upon which these distinctions can be supported. If there in reality be any, these cases have not pointed it out, but have stopped with simply announcing the supposed distinctions themselves." The opinion of the learned justice was so lucid and instructive on the whole subject of orders after judgment as to justify a further and extended quotation. Continuing he said: "By an examination of section 347, supra, it will be seen that certain enumerated orders made in a case, and which respectively concern a new trial, an injunction, an attachment, or proceedings in partition, constitute of themselves distinct subjects of appeal, whether entered before or after the rendition

6 See Quivey v. Gambert, 32 Cal. 304; Pendergast v. Knox, 32 Cal. 73, and cases cited.

7 42 Cal. 110.

8 See Sutton v. Symonds, 97 Cal. 476, 32 Pac. 588; Clark v. Crane, 57 Cal. 633; Vole v. Hollis, 60 Cal. 572.

of final judgment. So, if any order, though not included within this enumeration, be made before the rendition of final judgment, it is reviewed here through the instrumentality of an appeal taken from the judgment itself; and section 347 declares that any special order made after final judgment shall also, of itself, be the subject of appeal. The necessity for this latter provision is apparent, when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the rendition of the judgment, and that such an appeal may have been taken, and even disposed of here, by affirmance or reversal, before the order complained of was made in the court below; so that while an appeal from a judgment might in some instances be safely relied upon for the review of an order entered before its rendition, it would afford no reliable remedy against such an order only entered subsequently to its rendition. Accordingly, the statute allows an appeal to be taken directly from any special order made after final judgment, as the only safe and convenient method for its review. The statute declares such an order, made subsequently in point of time to the rendition of the judgment, to be the subject of a distinct appeal, and we are not at liberty to add that it must also be an order made in the direct line of the procedure. From an order refusing to dissolve an attachment, for instance, an appeal is given by designation, 'from any special order made after final judgment'; a like appeal is as clearly given by definition, and I do not see why we may not, upon some idea of the particular line of procedure pursued below, refuse to entertain an appeal in the one case with as much propriety as in the other. For other reasons, too, I think that the rule laid down by the cases cited upon this point ought not to be maintained; the rule itself is so vague and indefinite that its application to cases coming here on appeal would in many instances, be productive of the utmost confusion and the most profitless preliminary discussion. What is the required line of procedure? In what way must the order depend upon the judgment? Or, when may it be said to follow the judgment in the same line of proceeding? Can there be said to be any uniform line of proceeding at all, or one that is capable of such delineation as would make it safe or reliable as a boundary line between orders within and orders without

the appellate jurisdiction of this court? Nor does the rule in question, by its practical operation upon the substantial rights of parties, commend itself to my judgment. For under that operation a special order, if made after the rendition of judgment and made in a case, too, within our appellate jurisdiction, though it may be clearly erroneous and perhaps of the most oppressive and ruinous character, is nevertheless effectually withdrawn from revision in this court, because, forsooth, it was not entered in a particular line of procedure. Its other errors are not to be inquired into here, because it has the merit of having been irregularly entered in the court below." As thus settled the law permits an appeal from any order made after judgment, that is to say, any order in the action which is subsequent in point of time to the entry of the judgment, not reviewable on appeal from the judgment, and which could not be availed of on motion for new trial. But an order does not come within the definition for the purposes of appeal if the law has expressly provided another method of procedure for its correction. Thus it was held that orders made in a proceeding to have a homestead appraised at the instance of a judgment creditor, was not appealable, the court saying: "We do not think the orders are appealable. The statute provides that the application of the creditor is to be 'to the superior court of the county in which the property is situated.' It is not necessarily to be made to the court which rendered the judgment. Therefore it is not to be a proceeding in the action. It is to be an independent proceeding—a special proceeding. At least, it must be so where the homestead is situated in a different county from that in which the judgment was rendered; and we do not think that the meaning of the statute is that such applications are to be held to be of different natures according to the place in which they may happen to be made. Taking it to be an independent proceeding, the order complained of cannot be held to be 'special orders made after final judgment.' For such orders must be in the cause in which the judgment was rendered." [9]

[9] Brown v. Starr, 75 Cal. 163, 16 Pac. 760; Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70.

As has been shown,[10] no appeal can be taken from the judgment until it is entered; therefore, the reason for allowing an appeal from an order after judgment, namely, that it cannot be reviewed on appeal from the judgment, does not exist if the order be made in point of time prior to its entry, though made after its rendition.

§ 519. Orders pertaining to costs, considered with relation to entry of judgment.

It is usually not difficult to determine whether an order be appealable by reason of the question of time when made, with relation to the entry of the judgment; but there were at one time views of the court, expressed sometimes in the form of decisions, and at other times in the form of mere dicta, which were so conflicting with reference to the right of appeal from orders relating to costs and cost-bills, as to create serious doubts on the subject. As the costs of an action often exceed the value of the matter in litigation, the subject is of some importance. It is to be noted in the first place that orders relating to costs are not among those appealable orders specified eo nomine in the second subdivision of section 963, and if reviewed at all, it must be on separate appeal, as from one made after judgment, or upon appeal from the judgment. For the latter purpose a bill of exceptions is required, since there is no provision for making any bill of costs or any order thereon a part of the judgment-roll. Whether the one method or the other be proper depends upon the question of whether the order be made before or after the entry of judgment. The code provision on the subject of taxing costs reads as follows: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating

10 Ante, §§ 485, 486.

that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. By the decision of the court or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law."[11]

The earlier California decisions adhered to the doctrine that inasmuch as costs entered into the judgment, and were given by it, the question could only be reviewed on appeal from the judgment. Perhaps the best exposition of this view is found in Lasky v. Davis,[12] where the court said: "An order made on a motion to retax costs is not appealable. It is not an order made after final judgment within the meaning of section 343 of the Practice Act, even though it be made after the entry of judgment, for in legal effect the order, if the motion is granted, amounts to a modification or amendment of the judgment, or, in other words, becomes a part of it. If the motion is denied, the error is none the less in the judgment, and can be reviewed only upon an appeal from the judgment. Costs are included in and constitute a part of the judgment, and hence, though ascertained and adjudged by the court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment." And the appeal was dismissed. But in that case the court cited several cases, in support of this view, and among them, Levy v. Gettleson,[13] in which it was simply held in keeping with the rule stated above that an order denying a motion to retax costs made after rendition, but before entry of judgment, was not a "special order made after final judgment," and that the proper course would have been to appeal from the judgment, raising the question of the correctness of the taxa-

[11] Cal. Code Civ. Proc., § 1033.

[12] 33 Cal. 677. See, also, Orr v. Haskell, 2 Mont. 351.

[13] 27 Cal. 686. To same effect, Flubacher v. Kelly, 49 Cal. 116; In Kelly v. McKibbin, 54 Cal. 194, where the court could not review the order because of defectiveness of the record on appeal.

tion of costs by a statement annexed to the judgment-roll. But Jones v. Frost[14] appears to have been overlooked by the court. In that case it was held that the proper method for the review of an order, adding a sum by way of costs to the judgment after its entry, was by appeal from the order. In Dooley v. Norton[15] the correct rule was stated, the proper distinction drawn between orders in relation to costs before and after the entry of judgment, and the decision in Laskey v. Davis practically overruled. The order on a motion by the defendant to retax the costs had been made after the entry of judgment and was dismissed by the lower court on the ground that it had no jurisdiction of the motion, and the defendant appealed. The court, per Sprague, J., in reversing the order, said: "Had the order dismissing the motion been made before the rendition of the judgment, it might have been reviewed under an appeal from the judgment, and might have been presented by a statement on such appeal. But the question here presented is, whether an appeal lies from the order, as a special order made after final judgment. . . . . The order made on the motion to retax the costs in an action is a proper subject for review, in some mode, in this court. If made before the judgment is rendered, it may be reached by an appeal from the judgment; but if made more than twenty days after the entry of judgment, how is the question to be presented for review? It is very clear, upon the authorities in this court, that it can be presented only by means of a statement on appeal. The statement cannot be annexed to the judgment, because more than twenty days have elapsed since the entry of the judgment. If it is not annexed to the order it has no place in the record and cannot be brought before the appellate court. A motion to retax the costs is in effect a motion to modify the judgment, and, however the order may be considered, when it is made before the entry of the judgment, it seems clear to me that when it is made after the entry of the judgment it is an order after final judgment as fully in every sense as an order modifying the judgment in any other respect. If this be not the true construction the party complaining of the order would, in many instances, be without redress." Dooley v. Norton has been fre-

14 28 Cal. 246.

15 41 Cal. 439, 441.

quently cited as authority where appeals from orders pertaining to matters other than costs were involved, and it has been approved and followed in several subsequent cases, not only in California, but elsewhere, on appeals from orders made after judgment, relating to costs.[16] In other cases appeals have been entertained from such orders without question as to the proper appellate practice.[17] In Quitzow v. Perrin[18] the rule in Dooley v. Norton was expressly approved. The case, however, presents some peculiar phases. The order retaxing costs was made after judgment, and there was no appeal from the order, and yet the court held it could be reviewed on appeal from the judgment, because the judgment was for less than three hundred dollars, in which case plaintiff not being entitled to recover costs, and from both this fact and the fact that costs were allowed, the court held that the error was apparent upon inspection of the judgment itself and constituted an exception to the rule applicable to orders made after entry of judgment. The court accordingly modified the judgment by striking out the item for costs.

The supreme court of Montana, in Granite Mountain Min. Co. v. Weinstein,[19] attempted to distinguish that case from its previous decision in a prior case and other decisions in line with it, but wound up its decision by approving Dooley v. Norton, and subsequent California cases.

§ 520. Orders pertaining to costs—Considered with reference to amount as an element of appellate jurisdiction.

On the question whether the appealability of an order made after final judgment, and pertaining to costs, is affected by the amount of such costs, there has existed some conflict, and considerable uncertainty has resulted. The rule as finally settled

16 See Empire G. M. Co. v. Bonanza etc. Co., 67 Cal. 406, 410, 7 Pac. 810; Schollert-Ganahl L. Co. v. Neal, 94 Cal. 192, 194, 29 Pac. 622.

17 See Jacobi v. Bauer, 55 Cal. 554; O'Neil v. Donahue, 57 Cal. 226; Alderman v. Kirkpatrick, 57 Cal. 353.

18 120 Cal. 255, 260, 52 Pac. 632.

19 7 Mont. 346, 17 Pac. 108.

in California, in Southern Cal. Ry. Co. v. Superior Court,[20] is to the effect that in any case where the supreme court possesses appellate jurisdiction of the action subsequent to the judgment in which an order is made, the appealability of such order is not controlled or affected by the amount involved. The court reviewed many authorities, and may be said to have established the above rule, for all appealable orders, whether made before or after final judgment, whether the action be legal or equitable. A perusal of the opinion is recommended in all cases which may arise involving this question. It would, perhaps, not be proper to say that the above case settles the question beyond all doubt. It was not the case of an order involving costs, but one involving an order to the sheriff to pay over a sum of money less than three hundred dollars. The language of the court in prior and comparatively recent cases was very positive to the contrary;[21] but they were decided in departments, whereas the case above named was heard and decided in bank, the whole court concurring. In course of the opinion the court said: "As said in Harron v. Harron, supra, Fairbanks v. Lambkin, supra, was decided mainly upon the authority of Langan v. Langan, supra, and was based upon the proposition that the amount of money involved in the appeal was determinative of the jurisdiction of this court; but the appellate jurisdiction of this court includes all appealable orders that may be taken in a 'case' which is within its jurisdiction, and it follows therefrom that the amount of money involved in an appealable order is not the test for determining its jurisdiction."

Appeal lies from such orders when made after judgment without taking an appeal from the judgment.[22]

20 127 Cal. 417, 420, 59 Pac. 789. See, also, Harron v. Harron, 123 Cal. 508, 56 Pac. 334; Ryan v. Maxey, 15 Mont. 100, 38 Pac. 228; ante, § 127.

21 See Fairbanks v. Lambkin, 99 Cal. 429, 34 Pac. 101; Sellick v. De Carlorn, 95 Cal. 644, 30 Pac. 795; Langan v. Langan, 83 Cal. 618, 23 Pac. 1084; Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864; Foley v. California Horseshoe Co., 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; Lee Chuck v. Quan Wo Chang, 91 Cal. 593, 28 Pac. 45.

22 Yorba v. Dobner, 90 Cal. 337, 27 Pac. 185.

§ 521. Further illustrations.

Of the exercise of the appellate jurisdiction of such orders an almost interminable list could be given. The following will suffice: Order setting aside an execution levy and sale;[23] order in form one for the dissolution after judgment of an attachment, but in effect a direction by the court to the sheriff to disregard the rights of the attaching creditor in making a levy under an execution issued on the judgment;[24] order allowing service of complaint and issuing execution after judgment;[25] order granting additional time to defendant in which to prepare a statement on motion for a new trial and a bill of exceptions;[26] order of sale of the mortgaged premises for the entire debt after its maturity, made upon motion after judgment of foreclosure and sale for nonpayment of interest;[27] order confirming sale of real estate made under execution;[28] order setting aside sale under foreclosure;[29] order allowing an attorney's fee in action to foreclose a mechanic's lien;[30] order granting writ of assistance;[31] order for the discharge from imprisonment of a judgment debtor, made under the provisions of an "Act for the relief of persons imprisoned on civil process";[32] order striking out statement on motion for new trial.[33]

23 Otis v. Nash, 26 Wash. 39, 66 Pac. 111; Ballinger's Codes and Statutes, § 6500, subd. 7.

24 Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759.

25 Greeley v. Winsor, 2 S. Dak. 361, 50 N. W. 630.

26 Beach v. Spokane R. & W. Co., 21 Mont. 7, 52 Pac. 560.

27 Byrne v. Hoag, 126 Cal. 283, 58 Pac. 688.

28 Dakota Ins. Co. v. Sullivan, 9 N. Dak. 303, 81 Am. St. Rep. 584, 83 N. W. 233.

29 Kirby v. Ramsey, 9 S. Dak. 197, 68 N. W. 328.

30 Schallert-Ganahl L. Co. v. Neal, 94 Cal. 192, 29 Pac. 622.

31 Davis v. Dormer, 82 Cal. 35, 22 Pac. 879.

32 Wells, Fargo & Co. v. Anthony, 35 Cal. 696.

33 Beach v. Spokane R. & W. Co. 25 Mont. 379, 65 Pac. 106. But order granting amendment to proposed statement of case on motion for new trial is not appealable because another remedy for such case is provided by statute: Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70.

CHAPTER 28.

PARTIES TO THE PROCEEDING.

§ 522. Statutory provisions—General rule as to parties applicable.
§ 523. Suggestion of test for determining who proper parties appellant.
§ 524. Joinder on appeal, a subject of but little importance.
§ 525. Further as to meaning of "party aggrieved."
§ 526. Same subject—Parties holding fiduciary relation.
§ 527. Further as to meaning of "party aggrieved"—Rule when judgment shows no interest.
§ 528. Right of party recovering judgment to appeal.
§ 529. Transfer of interest as affecting right of appeal.
§ 530. Appeals by persons not original parties to action.
§ 531. Parties respondent.

§ 522. Statutory provisions—General rule as to parties applicable.

With respect to the party appellant, the provision of the California Code of Civil Procedure is very brief and clear. "Any party aggrieved may appeal in the cases prescribed in this title."[1] This has been the wording of the statute since 1851.[2] This is a statutory designation of the class of persons who may prosecute appeals in all appealable matters. As such it would seem to exclude all who are not, though they become, real parties. But as will be presently seen, it is not strictly construed. The balance of the section is as follows: "The party appealing is known as the appellant, and the adverse party as the respondent." It will be observed that while the appellant must be an aggrieved party, nothing is positively stated as to who must be the respondent. The wording is somewhat ambiguous, leaving it to be inferred that the appellant may select as his adversaries any he may choose from among the

1 Cal. Code Civ. Proc., § 938.

2 Laws 1851, p. 104.

parties to the action, and proceed against him or them. But the language is not so construed. The question of joinder, or nonjoinder, of parties on an appeal is governed, to a great extent at least, by the same rules as in an action; and every party not joining in the appeal, whose interest in the litigation would be adversely affected by a reversal or modification of the judgment or order, must be constituted a respondent by the method hereinafter discussed.[3] On the other hand, the provision that "any party aggrieved may appeal" excludes, as a general rule, subject, however, to one or two exceptions, every person not a party to the action from the privilege of appealing. The rule was enforced very soon after the provision in its present form was adopted. In Montgomery v. Leavenworth,[4] an assignment of an interest in the action instituted an appeal from an order; but the supreme court, in dismissing the appeal, remarked that no appeal prosecuted by him could be sustained, he not being a party to the cause. This case appears to have been overlooked in subsequent decisions, but the rule therein announced has been steadily adhered to.

Instances of persons making themselves parties, by some appropriate proceeding, after action by the court prejudicial to them are not exceptions, however, much they may appear to be.

§ 523. Suggestion of test for determining who proper parties appellant.

If it had been intended that any party to an action could appeal, it would have been so expressed, but the right is limited to parties "aggrieved." The question of what is the grievance in the form of a judicial determination is far from being easy to answer under all circumstances, as the voluminous judicial discussion of the subject proves.

[3] See next chapter.

[4] 2 Cal. 57, 58, cited and approved in United States v. Florida etc. R. R. Co., 15 Fla. 730. See, also, Woods v. Pollard, 14 S. W. 44, 84 N. W. 214. Where a defendant brings error, and fails to join a codefendant, the supreme court may, within the statutory time for bringing error, on motion of the plaintiff in error, with the consent of the codefendant, allow such codefendant to be joined as a plaintiff in error: Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756.

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The test, with respect to the appellant, is the same as that in reference to writs of error. The question to be answered in determining the right is whether the person claiming the right of appeal would have had the thing if the erroneous judgment had not been given; and if this question be answered affirmatively, then his right is established. In a Texas case[5] the words, "any person aggrieved," were construed to mean "any person having an interest recognized by law in the subject matter of the judgment, which he considers injuriously affected by the action of the court."

§ 524. Joinder in appeal, a subject of but little importance.

It is clear that since "any party aggrieved" may appeal, the right is not affected by the nonjoinder in the appeal of another who, though a party of record, has no interest in a reversal or modification. Accordingly, it was held that a party defendant could appeal from a judgment on demurrer though a codefendant had not appeared and was not served with the summons.[6] And where two of several defendants appeared before service was had, and the court granted a motion by them to strike plaintiff's amended complaint and for a judgment of nonsuit, it was held that an appeal by plaintiff would lie, though the other defendants were not served and did not appear, and the action was not dismissed as to them.[7] Parties similarly affected may join in an appeal,[8] but may take separate appeals,[9]

5 Peary v. Goss, 90 Tex. 93, 37 S. W. 317.

6 Lough v. John Davis & Co. (Wash.), 70 Pac. 491. To same effect, Radebaugh v. Tacoma & P. R. Co., 8 Wash. 570, 36 Pac. 460.

7 Keef & Tibbals, 18 Wash. 656, 52 Pac. 227.

8 Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415. In this case it was held that an appeal from a judgment rendered in favor of two defendants upon their cross-complaint in an action to quiet title against the plaintiff and another defendant might be taken by the latter jointly, in like manner as if the action had been brought against them as defendants, by the cross-complainants as plaintiffs; also that their joint notice and undertaking did not render their appeal subject to dismissal, on the ground that they were on opposite sides of the record as parties. In the first of these cases the court said: "While the trial of the issues presented under this cross-complaint is in the action brought by the plaintiff against the several

or some may appeal and others elect to abide by the judgment of the lower court. Consequently, the question of joinder, once important where writs of error were in use, is a subject of but slight importance in appellate practice.

But after an appeal from a final judgment in an equity cause, and a determination thereof, successive appeals cannot be prosecuted from that same judgment by other parties.[10]

§ 525. Further as to meaning of "party aggrieved."

Since there is not, and from the nature of the case cannot be, any reliable or uniform test of the right of appeal under the code designation, light can be obtained only from the adjudications. But an approximate test is found in the rule that a party cannot appeal unless he can show immediate substantial prejudice resulting from the judgment or order in question. And the corollary of this proposition is, of course, true—namely, that a party who would be benefited by a reversal or modification, may appeal. Thus where the court refused to enjoin a city from passing an ordinance granting a street railway franchise, or from receiving bids and accepting the highest bid, but enjoined appellants, who were applicants for such

defendants, the judgment is in legal effect the same as if the cross-complainants had instituted an original action against the plaintiff and their codefendant, and obtained judgment therein. The judgment is against the appellants herein, and the fact that they were on the opposite sides of the record in the original complaint does not impair their right to unite in the appeal or to give a joint notice of appeal any more than if they had been defendants in an original action against them by the respondents."

9 Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485; Cox v. Alexander, 30 Or. 438, 46 Pac. 794. In Wyoming writs of error are a feature of appellate practice.

10 Hill v. Sawyer, 14 Wash. 275, 44 Pac. 537. The reasoning of the court upon which the conclusion was based in this case was as follows: "While the question was not raised by the respondent, we are of the opinion that the appellants cannot prosecute this appeal, although they were not within the provisions of section 5 of Laws of 1893, page 121, as to joining, their interests not being affected similarly to the plaintiff's. Yet an appeal from a final judgment in an equity cause brings the entire cause here, not simply a part of it, and each party thereto must see to it that his rights are pro-

franchise, from taking any action under such ordinance, if enacted, until further order of the court, etc., such appellants were held to have an appealable interest, though there were other bids for the franchise than that of appellants and it was undetermined as to who was the highest bidder.[11] So where executors, under an order of court, published notices of a sale of the testator's personal property, and W. deposited the certified check required by bidders, and submitted the highest bid, and filed a petition praying that the sale to him be confirmed, it was held that he was entitled to prosecute an appeal from an order refusing to confirm the sale.[12] And it was held that a code provision requiring an insane or incompetent person to

tected in that hearing. Every question sought to be presented at this time was either expressly or in effect decided on the prior hearing. The express points decided were that the plaintiff was entitled to the benefit of his mortgage security for the commission and attorney's fee; but this of necessity carried with it the proposition that he had a right to maintain in his action in consequence of a breach of the mortgage conditions. Otherwise, he was not entitled to anything in that action, and by reversing the judgment as to these matters and remanding it to the lower court with the instructions given, the decree was in effect affirmed upon every other proposition. One of these was that the plaintiff's lien was the prior lien upon the premises. Although, from the investigation we have now given said matters, we are of the opinion that the decision of the lower court was right except on the questions raised by the plaintiff on the former appeal, yet, if the case were otherwise, and the present appeal should be entertained, and we should hold that the plaintiff had no right to foreclose at the time his action was brought, it would present the anomaly either of holding that the plaintiff was entitled to the commission and the attorney's fee before adjudicated as should be defeated as to his principal claim in that proceeding—the very foundation of his cause of action, or else that the prior appeal was of no effect and an entirely useless proceeding. It is no part of the duty or business of courts to decide abstract questions of law and fact. A final decision is intended to settle the controversies between the parties in that action, and it cannot be, from the very nature of the case, that after an appeal from the final judgment in an equity cause and a determination thereof, successive appeals can be prosecuted from that same judgment by other parties."

11 Wood v. Seattle (City of), 23 Wash. 1, 62 Pac. 135.

12 In re Auerbach's Estate, 23 Utah, 529, 65 Pac. 488.

appear either by his general guardian or by his guardian ad litem, appointed by the court, did not apply to a case where the very question involved was the validity of the order of guardianship itself, and where the appeal was taken directly from that order; also that such appeal might be taken by the alleged incompetent person, by his attorneys who appeared for him in the proceeding in which the order of guardianship was made.[13] On the other hand, trustees who claimed funds in the hands of an executor adversely to the estate and who had not presented any claim against the estate, were held not parties aggrieved by a decree distributing the funds to the heir.[14]

13 Matter of Moss, 120 Cal. 695, 53 Pac. 357.

14 Estate of Burdick, 112 Cal. 387, 44 Pac. 734. Justice Temple, delivering the opinion in this case, said: "The executor appeals, as he states in his notice, from the whole of the decree, 'except so much of said decree as settles the account of said executor, from which last-named portion he does not appeal.' The claim of the trustees to the five thousand dollars was set out by the executor in the petition accompanying his final account, but, so far as the bill of exceptions shows, no action was asked in regard thereto. But if action had been solicited in regard to it, I do not see how it could affect the matter here, for the executor has not appealed from the decree which settles his final account and determines how much remains in the hands of the executor belonging to the estate. This determination was clearly within the jurisdiction of the court. That decree is not before us on this appeal, and whatever errors we may suppose were committed by the probate court in reaching the conclusion, we cannot interfere with it. To attempt to do so would be an arbitrary proceeding without authority. The probate court has jurisdiction as between the executor and those claiming the estate to determine what belongs to the estate. This is implied in the power to settle the final account, and, by its decree, determine what remains in the hands of the executor to be distributed. Still, since the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate, if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum. While there is in the hands of the executor money which the executor claims does not belong to the estate, he should himself take steps to test the right, if serious question exists; and, if he is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached. His counsel says the probate court exceeded its jurisdiction in determining that this money belonged to the estate. I do not think so; but, if it did,

Nor has a plaintiff, in an interpleader suit, who has paid the money into court, the conflicting claimants having interpleaded between themselves, any further interest in the case, and he is not a party to an appeal from the judgment in such action.[15] In all the cases thus far noticed, it is seen that the appellant has no standing in the appellate court unless he be "aggrieved" by the action of which a review is sought. To this requirement there are no exceptions. A presumption is indulged, however, that one against whom a judgment has been given is aggrieved thereby, at least to the extent of giving him standing as an appellant. And where it was oojected in the supreme court that the appellant who had been made a party to the action had no interest, the court answered thus: "It is further urged in support of the motion, that the appellant has no interest in the decree, or in the subject matter of the controversy; that he was an unnecessary party; that prior to the commencement of the action he had assigned all the interest he ever had in the matter to others of the defendants. If such

the decree effected by the error was the decree settling the final account of the executor and determining that he had in his hands sixteen hundred dollars belonging to the estate after full administration. Since we cannot change or modify that decree on this appeal, no relief in that direction can be afforded. If we could here determine that the money belonged to the trustees, it would only establish another claim against appellant. It would not vacate the finding that he also had sixteen hundred dollars belonging to the estate which must be distributed to the heirs or legatees. The executor had an opportunity to test the right of the estate to the money in question. He claimed that it was assets of the estate, and the trustees that it was not. It was his duty, if he deemed his claim just, to get it for the estate, and he had no right to compromise the claim of the estate by consenting that the trustees should have it, provided they would pay the debts and the expenses of administration out of it. I do not think such is really the effect or meaning of the agreement of compromise. But such is the claim of the trustees. Having been permitted to inventory it as assets of the estate, and administrator it as such, the executor could not return the surplus to the trustees. To do so would be to assume the responsibility of maintaining the title of the trustees against the estate. The executor was not at liberty to assume such a position."

15 Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105. See, also, San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708.

be the case, that he has no interest, and ought not to have been made a party, it is the fault of the respondents that he was a party, and affords no proper ground for this motion. If he ought not to have been made a party, the plaintiff ought not to have made him a party, and he should have dismissed the case as to him. But the plaintiff cannot hold a judgment against him, and at the same time deny him the right to appeal from that judgment. By admitting that the appellant had no interest in the subject matter, and that he ought not to have been a party, the respondent virtually admits that he is not entitled to any judgment against him, which would of itself form a good ground for the appeal."[16] And in another case it was held that the defendants in a premature action, who had prevailed in a defense thereto, had a right to appeal from a judgment of dismissal thereof, which was declared to be not a bar to another action, which declaration was not in accordance with the prayer of their answer, and was in form a judgment against them.[17] It was held in an earlier case that this rule did not stand in the way of a dismissal of a frivolous appeal.[18] And a party is aggrieved by a judgment entered, or an order made, against him, even though it be conditional, and he is not bound to

16 Ricketson v. Compton, 23 Cal. 637, 650. See, also, Martin v. Porter, 84 Cal. 476, 24 Pac. 109.

17 Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120.

18 In re Blythe, 108 Cal. 124, 41 Pac. 33. But in Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120, without noticing this case the court said: "The respondent also urges as another reason for granting his motion that the appeal was taken for delay, and is frivolous, and in support thereof has presented an affidavit to the effect that in a subsequent action brought by him to foreclose the same mortgage the defendants herein have pleaded in abatement thereof the pendency of the present action by virtue of this appeal. Whether this appeal is sufficient to establish such plea of abatement must be determined, however, in that action. If it does not have that effect, it cannot be urged as a reason for granting the present motion to dismiss the appeal herein. An appeal, moreover, will not be dismissed upon the ground that it is frivolous, or taken merely for delay. The remedy therefor must be sought under section 957 of the Code of Civil Procedure: Lemon v. Rucker, 80 Cal. 609, 22 Pac. 471; Randall v. Duff, 105 Cal. 271, 38 Pac. 739. See, also, Hooper v. Beecher, 109 N. Y. 609, 15 N. E. 742.

wait until the party in whose favor it was entered or made has performed the condition, and is proceeding to enforce it, but may, if the order or judgment belong to an appealable class, appeal from the same when entered. Thus, in Ely v. Frisbie,[19] the court said: "The objection that, as the order directs the injunction only upon condition that an undertaking be executed and filed, and as it does not appear that there was any such undertaking, the defendants are not 'parties aggrieved,' and as such entitled to appeal, is untenable. The parties aggrieved, within the meaning of the three hundred and thirty-fifth section of the Practice Act, who are entitled to appeal, are the parties against whom an appealable order or judgment has been entered. All orders for injunctions are made either upon an approval of an undertaking at the time, or upon condition that an undertaking be filed, and it is to prevent the execution of such orders that appeals are taken. It is not necessary for the party against whom an order has passed to wait until the injunction has already issued before taking his appeal."

§ 526. Same subject—Parties holding fiduciary relation.

Persons who hold a trust relation, under judicial appointment or otherwise, have, as a rule, no interest entitling them to maintain appeals from orders, judgments and decrees disposing of the subject of the trust. Unless the beneficiaries of the fund are dissatisfied and see fit to appeal, the disposition of the estate among the latter is no concern of the trustee. The law governing herein was very clearly and correctly expressed in a case where trustees appointed under a will had sued to obtain for their direction a construction of certain clauses of the will. They were held not aggrieved by an order of the court allowing the attorney and guardian ad litem for minor heirs a fee for his services to be paid by the trustees out of funds in their hands belonging to the estate. The court, in dismissing their appeal, said: "Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest. They are appointed by the court, or by will, and act on behalf of all the parties who claim any interest in the estate. The funds which

[19] 17 Cal. 250, 261.

come into their hands are held in custodia legis, to be distributed by the court by those who show themselves entitled to them; and it is their duty to distribute the money coming into their hands as the court shall direct. The trustees herein cannot litigate the claims of one heir against those of another, and it is immaterial to them whether certain devisees take the corpus of the residuary estate, or only the income thereof."[20] The principle was applied where an executor appealed from an order distributing an estate to persons found entitled thereto;[21] where an executor who was protected from the claims of creditors by a decree directing payment to the widow of insurance upon decedent's life, appealed from such decree.[22] And under a statute like that of California it is held that an administrator may not appeal from a general order directing him to turn over the estate to his successor upon his resignation or removal. In the case of Estate of Barker,[23] the reasons were thus stated: "If the particular property belonged to the estate, or came into his hands because of his official posi-

20 Goldtree v. Thompson, 83 Cal. 420, 422, 23 Pac. 383. See, also, Bates v. Ryberg, 40 Cal. 465; Estate of Wright, 49 Cal. 550; Rosenberg v. Frank, 58 Cal. 420; Roach v. Coffey, 73 Cal. 282, 14 Pac. 840; Estate of Williams, 122 Cal. 76, 54 Pac. 386; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; Estate of Callaghan, 119 Cal. 571, 51 Pac. 860; In re Barker's Estate, 26 Mont. 279, 67 Pac. 941; Schlegel v. Sisson, 8 S. Dak. 476, 66 N. W. 1087.

21 Estate of Williams, 122 Cal. 76, 54 Pac. 386; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176. In the first case, the court said: "The executor has no interest in the distribution of the estate further than to be protected, if he shall dispose of the property in accordance with its terms; and, if the court had jurisdiction to hear the petition, the order of distribution will be a complete protection against any claim that may be made against him by reason of his compliance therewith. The statute declares that the order is 'conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal': Code Civ. Proc., § 1666. The persons here enumerated are the only ones who could claim any portion of the estate, and, consequently, are the only ones who can be 'aggrieved' by an order of the court made in a matter in which it had jurisdiction of the subject matter and of the parties entitled thereto. The motion to dismiss the appeal is granted."

22 Schlegel v. Sisson, 8 S. Dak. 476, 66 N. W. 1087.

23 26 Mont. 279, 284, 67 Pac. 941.

tion as administrator, it was entirely proper for the order to be made, and, as administrator, he was bound to obey it. If it did not belong to the estate, and was not held as such, the court had no power to compel him to part with it. Upon the settlement of accounts, the court has no power to adjudicate and finally determine questions of title between the estate and third person. This can be done by action only, in which the parties may be accorded the right of trial in the ordinary way."

But this rule extends no further than the principle upon which it rests. A trustee, an administrator or executor, for instance, is bound not only to protect the estate in its entirety, but to see that no discrimination is made between, or illegal preference given, to any beneficiary over another; and unless he do this, he may be held liable to respond for any injury that may result, out of his own estate. This can hardly be designated as an exception to the rule above stated. In such cases, the trustee is a party actually aggrieved, and where an order is merely for the payment of funds, if any question of legality arises or wrong decision to which might attach a personal or a double liability, the right of the trustee to appeal is upheld.[24]

The principle was well illustrated in Estate of Smith,[25] the court, per McFarland, J., saying: "It is apparent, therefore, that—at least in the case of an insolvent estate—a valid order for the payment of the claim of a particular creditor, whether or not his claim be a preferred claim, cannot be made except upon the settlement of an account of the administrator after notice given as prescribed by the code. Otherwise, the other creditors would not be bound by the order; and if the administrator should obey it, he would do so at his peril. The appellant, therefore, was directly interested in the order appealed from, and has the right to appeal from it." In Estate of Heydenfeldt,[26] the court, after citing and quoting from Bates v. Ryberg,[27] said: "I think there has been a disposition to carry

24 See Estate of Welch, 106 Cal. 427, 39 Pac. 805; Estate of Heydenfeldt, 117 Cal. 551, 49 Pac. 713; Estate of Smith, 117 Cal. 505, 49 Pac. 456.

25 117 Cal. 505, 508, 49 Pac. 456.

26 117 Cal. 551, 49 Pac. 713.

27 40 Cal. 463.

the doctrine of that case beyond its legitimate scope, and further than it should be carried on principle. An administrator, or an executor, is a trustee of an express trust. He is authorized to sue or to be sued without joining with him the beneficiaries of the trust, but the suits which may thus be brought are suits affecting the trust, and not those in which he is individually interested. Among his beneficiaries are creditors. He not only may, but it is his duty to, defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees, or creditors."

If an administrator or executor seeks a review of an order upon a claim presented by himself against the estate in his hands, he must appeal in his individual, and not in his representative, capacity.[28]

§ 527. Further as to meaning of "party aggrieved"—Rule where judgment shows no interest.

It has been already stated that a party is presumed to be aggrieved by a judgment rendered, or an order made, against him.[29] Such presumption may, however, be rebutted by the record; and where a judgment shows on its face that the interest of a party is not affected by it, it is held that he cannot maintain an appeal therefrom, although he hold a position in the record adverse to the party recovering it. Thus, where, in an action to foreclose a lien upon a mining claim for labor done at the request of a defendant corporation, alleged to belong to it, and two other parties were impleaded as defendants, who were merely alleged to claim some interest in the property, and they having defaulted, judgment was entered against the corporation alone, without purporting to give any relief against any other defendant, it was held that they had no standing on appeal from the judgment. The court remarked that their appeal was "premature." [30] And where the only reference in the judgment to a banking corporation which had been made a defendant, was that "The default of the defendant

[28] In re Estate of Barker, 26 Mont. 279, 67 Pac. 941. To same effect, In re Phillips' Estate, 18 Mont. 314, 45 Pac. 222.

[29] Ante, §§ 522, 523, 525, 527.

[30] Scotland v. East Branch Min. Co., 56 Cal. 625.

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bank having been duly entered," the pleadings not alleging any cause of action against the corporation, it was said by the court that, since no estoppel could arise on such a judgment, there was no right of appeal.[31] And an appeal taken by a party whose name was omitted from the judgment was held to confer no jurisdiction upon the appellate court.[32] So it was held that a mortgagor could not complain that the interest for the junior mortgagee was not adjudicated in the decree foreclosing the senior mortgage.[33] And it has been held that a record on appeal may show such a waiver of, or acquiescence

31 School District v. Whalen, 17 Mont. 1, 15, 41 Pac. 849, the court saying: "The entry of the default of the bank was not a final judgment from which the bank could have appealed, even if any rights it had had been adjudicated in the suit." See Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109, where party brought action in individual capacity against herself in fiduciary capacity; People ex rel. etc. v. Reis, 76 Cal. 269, 18 Pac. 309.

32 Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083. In this case the court, in deciding as stated in the text, said: "If the judgment was properly entered at the time of the first imperfect record, the time allowed by statute for taking an appeal had expired. It is contended that the amendment was the correction of a clerical misprison, and did not extend the time to appeal. But if the petitioner could not have taken an appeal from the judgment as first entered, the amendment was quite material. It would hardly be contended that the judgment could be so entered and the record amended after the time for appeal had expired, and thereby a party be deprived of the right to appeal altogether. The time allowed for an appeal commences to run from the time of the actual entry of the judgment. The order amending the record shows that judgment was not actually entered against the petitioner until May 29, 1901. It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights given by the Code of Civil Procedure, cannot be lost to a party by such action, whether the effect was designed or not. The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be, whether he could have obtained the desired relief (on a proper showing) before the nunc pro tunc order was made. Could he have made his application as the judgment, order, or record was?"

33 Wortman v. Voorhies, 14 Wash. 152, 44 Pac. 129.

in, action by the court as to amount to an estoppel, cutting off the right of appeal.[34] But generally, the right to appeal will not be denied on account of matters of estoppel or waiver not appearing in the pleadings, verdict, or findings, or judgment.[35]

A waiver of error shown in the statement or bill of exceptions may affect the decision on appeal, but is not ground for a dismissal of the appeal.[36]

§ 528. Right of party recovering judgment to appeal.

There are decisions wherein it is declared without qualification that a party who has recovered a judgment cannot appeal therefrom.[37] But this rule, if such it may be considered, could only hold good where the judgment was for all the relief demanded by the party, in which case an appeal would be so absurd and frivolous as to insure its summary dismissal, or the imposition of damages as for a frivolous appeal.[38] And where an intervener sought only to enforce his claim against the plaintiff as an assignee of the note in suit, alleged to be subject to an equitable interest in his favor against the assignor of the note, and asked no relief against a maker of the note, he was held to have no ground for appeal as against such maker.[39]

That, though a judgment be, in form, favorable to a party, it may yet be for less or different relief than that to which

[34] See German Sav. etc. Soc. v. Kern, 38 Or. 232, 62 Pac. 788, 63 Pac. 1052, where defendant answered after a motion to strike out a complaint because a defective verification had been overruled, and this was held a waiver of the right to appeal from the denial of the motion.

[35] See Columbus River etc. Nav. Co. v. Vancouver Transp. Co., 32 Or. 532, 52 Pac. 513; Matter of Chope, 112 Cal. 630, 44 Pac. 1066; Collett v. Northern Pac. R. Co., 23 Wash. 600, 63 Pac. 225; In re Day, 18 Wash. 359, 51 Pac. 474, holding that the acceptance of the portion allotted in an order of distribution did not operate as a waiver of the right of appeal from such order.

[36] See post, §§ 650, 665.

[37] See Sleeper v. Kelly, 22 Cal. 456; Central Pac. R. R. Co. v. Creed, 70 Cal. 497, 499, 11 Pac. 772; Sutton v. Jones, 9 Colo. App. 36, 47 Pac. 400.

[38] See post, § 721.

[39] Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11.

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he was entitled, and hence appealable by him, is so reasonable and well-supported a doctrine that it cannot be considered a debatable proposition.

§ 529. Transfer of interest as affecting right of appeal.

The effect of a transfer of interest by appellants after an appeal is taken upon his standing in the appellate court is elsewhere considered.[40] A complete transfer of the property or right constituting the subject of the litigation, or cessation or succession of interest, prior to taking an appeal, usually destroys the right of appeal.[41]

But, while a party cannot appeal from a judgment in his favor, after receiving the benefits thereof, it is held that his right of appeal is not waived where the amount accepted would accrue to him in any event, notwithstanding the appeal, which was for the enforcement of a disputed right to money in addition to the amount accepted.[42] And the reason of the rule ceases where a payment is made under an order or a judgment of court to prevent a sacrifice or loss, under circumstances indicating acquiescence therein. Accordingly, it was

40 Post, §§ 652, 655, 704, 705.

41 See Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109.

42 Merriam v. Victor Placer Min. Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997. In Thompson v. Sines, 18 Wash. 359, 361, 51 Pac. 474, the court said: "It is further urged that there is no longer any controversy between the parties. It apears from the record that the distribution ordered has in fact been made. This of itself, we think, affords no sufficient reason for dismissing the appeal. The appellant preserved proper exceptions to the rulings complained of, and perfected an appeal within the time allowed by law giving notice and bonds for costs, and the giving of a bond to stay the judgment and order was not a condition upon which his right to appeal depended. It is also urged that by accepting a sum which was by the order appealed from directed to be paid to the appellant, the appellant thereby waived a right to appeal. Disposing of a similar question in Hinchman v. Point Defiance Ry. Co., 14 Wash. 349, 44 Pac. 867, we said: 'It is apparent that the appellant is entitled in any event to all that he received, no matter what disposition is made of the case.' The ruling in that case is decisive of the question raised here, and upon the authority of it this branch of respondents' motion must be denied."

held that the act of an administratrix in paying the amount of a judgment directing her to pay the same within sixty days or forfeit to the plaintiff all interest of the estate in certain lands, which the plaintiff, as successor of a devisee, had redeemed from sale under foreclosure of a mortgage executed by the decedent, was prudent, in protection of the estate from a strict foreclosure of its rights, and might well be regarded as compulsory; that such payment could not deprive her of the right of appeal from the judgment, where there was no compromise nor concession by the respondent, and no condition imposed or assurance given that the appeal would not be prosecuted.[43]

§ 530. Appeals by persons not original parties to action.

The words, "any party," apply as well to those made parties after the commencement of the action as to the original parties. And where persons not made parties, yet claim an in-

[43] Warner v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. Pac. 1017. In Hayes v. Nourse, 107 N. Y. 577, 579, 1 Am. St. Rep. 891, 14 N. E. 508, it was said: "It must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal. . . . . The statute giving the right to appeal only requires that the judgment shall be final, that the appeal shall be taken within one year after it is entered, and, anticipating such a case as that now presented, provides that if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule prevailed before the code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended." In Erwin v. Lowry, 7 How. 184, the supreme court of the United States said: "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights."

terest in the subject of litigation, and pursue a method prescribed by statute to become parties, they will be treated as parties for the purposes of an appeal, although their effort proved fruitless by reason of the decision of the court adverse to their right to become parties by the method adopted. Thus, where parties before the trial presented a sufficient complaint in intervention and asked to be made parties, the court said: "Their motion to be permitted to intervene, its refusal, and their exception, have made them parties to the record in the technical sense, entitled as such to prosecute an appeal."[44] In that case, the interveners appealed both from the order and the judgment. No question was raised to their right to appeal from the order as well as the judgment, if they had a right of appeal from either, and the court acquiesced. But an order on an application to intervene is not mentioned in the code as an appealable order. This decision cannot be considered authority further than as to the right in such case to have the order reviewed on appeal from the judgment. That, however, will furnish an adequate appellate remedy in every such case. And the petition in intervention must be filed before judgment in the lower court, and is of no avail if filed afterward, merely for purposes of appeal.[45]

And for the purposes of an appeal, those are treated as aggrieved parties who are brought in under an order made on an application for an injunction, an injunction being granted against them.[46]

And the term, "any party aggrieved," is held to extend to and include parties whose interests are incidentally, but materially, affected by the enforcement of the judgment; and upon their taking proper steps to obtain relief in the lower court,

44 Coburn v. Swift, 53 Cal. 742, 745. See, also, notes in 16 Am. Dec. 184, and 60 Am. Dec. 431. There is a dicta, however, in People v. Pfeiffer, 59 Cal. 89, to the effect that an appeal will lie from an order dismissing a complaint in intervention: See, also, Stitch v. Goldner, 38 Cal. 610; also, see 16 Am. Dec. 184, and 60 Am. Dec. 431.

45 Estate of McDermott, 127 Cal. 450, 59 Pac. 783. See, also, Estate of Noah, 88 Cal. 468, 26 Pac. 361.

46 Jones v. Thompson, 12 Cal. 191.

and being refused, appeals taken by them, as parties aggrieved, were entertained, even against objection.[47]

And it seems that collateral or incidental matters may arise in an action resulting in orders which directly affect the interest of persons who, though not parties to the action, yet become connected with the subject matter of the litigation in such way as to entitle them to be treated as parties for purposes of appeal. Thus, in Adams v. Woods,[48] the claim of counsel of a receiver in an equity case was allowed by a referee, and the report or finding of the referee having been set aside by the court, the attorney in whose favor the allowance was made appealed from the order. The supreme court overruled the objection taken, that the appellant, not being a party, could not maintain an appeal, but affirmed the order upon the merits. And where the probate court, after a sale of real estate by an administratrix, had confirmed the sale, it was held that the purchaser at such sale could maintain an appeal from an order directing a resale of the property, though not originally a party to the proceeding.[49]

Appeals have been entertained under this head; from an order appointing a guardian of a person alleged to be incompetent to manage his property, by the alleged incompetent;[50] from an order granting letters of administration by one claiming a prior right to the party to whom they were granted;[51] by a garnishee to proceedings between the creditor and original defendant, upon final judgment being given;[52] by the

[47] People v. Grant, 45 Cal. 97, 99. See, also, Green v. Hebbard, 95 Cal. 41, 30 Pac. 202; Pignaz v. Burnett, 119 Cal. 162, 51 Pac. 48; San Jose (City of) v. Fulton, 45 Cal. 316, 320, 321; Gibson v. Marshall, 64 Miss. 75, 8 South. 205. In Pignaz v. Burnett, supra, the appeal was from an order denying an injunction against the sheriff who was preceeding to execute a writ issued in the judgment, against the appellants in possession of premises, they not having been made parties to the action; but the court held their application to have been in legal effect one to vacate the writ.

[48] 8 Cal. 306.

[49] Estate of Boland, 55 Cal. 310.

[50] Matter of Moss, 120 Cal. 695, 53 Pac. 357.

[51] Estate of Damke, 133 Cal. 433, 65 Pac. 888.

[52] Santa Fe Pac. Ry. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977.

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state, where, under a statute providing that, on usurious contracts, a penalty shall be paid to the school fund, the penalty not being enforced on such contract.[53]

Within the same principle, it was held that a landlord who had been permitted, though without an order making him a party, to appear and defend an action of ejectment against his tenant, could maintain an appeal in the name of the tenant from a judgment against the latter.[54] But the irregularity of the proceeding was apparent to the court, and it only went so far as to decide that it would not entertain an objection raised for the first time in the supreme court, implying that it would have been well taken in the lower court. It is difficult to see, since there are ample statutory modes for interested persons being made, or making themselves, parties, how a failure to pursue that course can be overlooked even in the appellate court. There was not, however, at the date of this decision, any provision allowing an intervention in actions at law, such as is now found in the code.[55]

But to give one not a party, who has suffered, or who is about to suffer, a loss by reason of the judgment, a right of appeal, such loss must appear as the immediate and not a remote consequence of the judgment or order.[56] In the absence of such a statute, there are ample reasons for relaxing the general rule, since, if the landlord has notice from the tenant to appear and assume the burden of the defense, and acts upon such notice, he, as well as the tenant, is bound by the judgment.[57] It had been previously decided that a provision of the Practice Act that "any person may be made a defendant

53 State v. Eves (Idaho), 53 Pac. 543; Idaho Rev. Stats., § 1266.

54 Dutton v. Washauer, 21 Cal. 609, 620, 82 Am. Dec. 765.

55 Cal. Code Civ. Proc., § 387. An able statement of the law governing this subject will be found in Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

56 People v. Pfeiffer, 59 Cal. 89; Adams v. Woods, 8 Cal. 306, 316. A person neither an active party to the hearing of a motion for confirmation of a sale by a receiver, nor a party to a motion to vacate the order of confirmation cannot appeal from the decisions thereon: Nicol v. Skagit Boom Co., 12 Wash. 230, 40 Pac. 984.

57 Valentine v. Mahoney, 37 Cal. 389, 394.

who has or claims an interest in the controversy adverse to the plaintiff," was not applicable to actions of ejectment.[58] When the Code of Civil Procedure was adopted, a provision allowing the landlord to be made a party was inserted.[59]

§ 531. **Parties respondent.**

The next matter to be considered is the adverse interest which necessitates one holding it being made a party respondent on appeal. The general rule herein rests upon the interpretation of the term "adverse party" as used in statutes, and it includes all who will be affected by a reversal or modification of the judgment or order appealed from. This rule has been often stated and applied. But, since the subject is so necessary to be considered by the party taking steps to appeal, and is so closely connected with giving notice of appeal, it is thought best to reserve discussion, and authorities to be taken up in the next chapter under that head.

[58] Garner v. Marshall, 9 Cal. 270.

[59] Cal. Code Civ. Proc., § 379.

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CHAPTER 29.

NOTICE OF APPEAL.

§ 532. Time within which appeal may be taken.
§ 533. How appeal taken—Sense in which filing and serving notice constitutes the taking of appeal—Relation to undertaking—Statutory changes.
§ 534. Form and requisites of notice.
§ 535. Signature to notice—Herein as to authority of attorney.
§ 536. On whom notice to be served.
§ 537. Meaning of "adverse party" as used in statutes.
§ 538. Further as to "adverse party"—Failure to appear—Fictitious parties.
§ 539. Filing the notice.
§ 540. When notice may be served.
§ 541. How notice served.
§ 542. Same subject—When service upon party individually sufficient.
§ 543. Rule that each prescribed step in process of appealing is jurisdictional.

§ 532. Time within which appeal may be taken.

The question of the time for appealing from a judgment or order is a question of the time for serving and filing notice of appeal, since, by these acts an appeal is taken.[1]

An appeal is pending from the time the statutory requirement of the filing and service of the notice is complied with.[2]

The time varies in most of the states for taking appeals from judgments and orders respectively, and from judgments in various classes of actions and proceedings, and from various kinds of orders. The California code[3] provides as follows: "An appeal may be taken: 1. From a final judgment in an ac-

1 See next section.

2 See post, §§ 543, 544-546.

3 Cal. Code Civ. Proc., § 939.

tion or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment"[4]

The third and last subdivision of the same section enumerates all the appealable orders following the form and order found in section 963 of the same code, likewise omitting orders in probate matters and limits the time for appealing from them to sixty days.[5] Another section[6] relating to probate proceedings found in the chapter on that subject reads as follows: "The appeal must be taken within sixty days after the order, decree or judgment is entered."

[4] That unless the appeal be taken within the time here limited it will not be considered in the appellate court: See McGorray v. Stockton Sav. etc. Soc. 131 Cal. 321, 63 Pac. 479; Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Gallagher v. Cornelius, 23 Mont. 27, 57 Pac. 447; Welcome v. Howell, 20 Mont. 42 49 Pac. 393. In re Houghton, 5 S. Dak. 537, 59 N. W. 733, revocation of attorney's license; Mouser v. Palmer, 2 S. Dak. 466, 50 N. W. 967, dismissal of appeal from justice of the peace; State ex rel. etc. v. Lamm, 9 S. Dak. 418, 69 N. W. 592, generally. The rule applies to what are known as interlocutory decrees, which really are orders: Bartlett v. Mackey, 130 Cal. 181, 62 Pac. 482; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88.

[5] That the taking of the appeal within the time here limited is essential to secure consideration, see Doyle v. Republic Life Ins. Co., 125 Cal. 15, 57 Pac. 667; Estate of Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192; Illinois etc. Bank v. Pacific Ry Co., 99 Cal. 407, 33 Pac. 1132; Sutton v. Symonds, 97 Cal. 475, 32 Pac. 588; Richter v. Eagle L. Assn., 24 Mont. 346, 61 Pac. 878; Deitrich v. Steam Dredge etc., 14 Mont. 261, 36 Pac. 81; Threlkeld v. O'Neal, 26 Mont. 209, 66 Pac. 940; Reinhart v. Company D. etc., 23 Nev. 369, 47 Pac. 979.

[6] Cal. Code Civ. Proc., § 1715. Appeal must be taken within time thus limited: Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Heldt, 98 Cal. 553, 33 Pac. 549; Estate of Backus, 95 Cal. 671, 30 Pac. 796; Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Fisher, 75 Cal. 523, 17 Pac. 640; Estate of Burton, 64 Cal. 428, 1 Pac. 702; In re Reilly's Estate, 26 Mont. 358, 67 Pac. 1121.

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The time for appealing in criminal cases is generally limited. No exception to this statement has been found in the penal laws of any state.[7] The limitation in the California Code of Civil Procedure is as follows: "An appeal from a judgment must be taken within one year after its rendition, and from an order, within sixty days after it is made."[8]

Several important changes were made from time to time in the provisions governing the time for taking appeals in civil actions and proceedings in California, the most important of which was that made in 1897 by which the time for appealing from judgments in civil actions and proceedings other than probate was shortened from one year to six months.[9]

The code leaves little room for discussion or difference of opinion as to what is essential to consummate an appeal or as to what are the essential, specific things to be done. The provision is as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."[10]

The filing of the undertaking is not an essential prerequisite to the consummation of the appeal, but rather a condition subsequent, a failure to perform which may defeat the appeal, that is, render it "ineffectual for any purpose."[11] Slight changes have been made from time to time, in the wording of the provision, with reference to the effect of a failure to file

7 Cal. Pen. Code, § 1239.

8 Cal. Code Civ. Proc., § 940.

9 Construed in Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, and Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, not to be intended to operate retrospectively upon judgments entered before its passage, but as limited in its operation to judgments thereafter entered.

10 Cal. Code Civ. Proc., § 940.

11 Lowell v. Lowell, 55 Cal. 316.

the undertaking; but the differences between the statute at any former period and the present provision is usually so obvious upon inspection of each adjudication as to render a detailed account of such changes unnecessary.

Statutes speak for themselves with reference to the period allowed for appealing; but there is often a serious question as to the point or stage in the proceedings of the lower court at which the period begins, in other words, as to when the time is ripe for giving the notice.

In the case of a judgment, it is fully settled in states having similar statutes to those above quoted that an appeal must be taken within the time limited by statute after the permanent entry of the judgment;[12] and that an appeal taken prior to such entry is premature, conferring no jurisdiction;[13] that, in the case of an order, an appeal must be taken within the period limited by statute after the order is entered in the min-

12 See Coon v. Grand Lodge etc. 76 Cal. 354, 18 Pac. 384; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Watson v. Maberry, 15 Utah, 265, 49 Pac. 479; Agassiz v. Kelleher, 11 Wash. 88, 39 Pac. 228.

13 See Onderdonk v. City and County of San Francisco, 75 Cal. 534, 17 Pac. 678; Thomas v. Anderson, 55 Cal. 43; Kimple v. Conway, 69 Cal. 71, 10 Pac. 189; Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 302; Coon v. Grand Lodge etc., 76 Cal. 354, 18 Pac. 384; Home for Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119; McLaughlin v. Doherty, 54 Cal. 519; McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2; Vollmer v. Nez Perces County (Idaho), 62 Pac. 925; McTavish v. Great Northern Ry. Co., 8 N. Dak. 333, 76 N. W. 985; Martin v. Smith, 11 S. Dak. 437, 78 N. W. 1001; Dyea Elec. L. Co. v. Easton, 14 S. Dak. 520, 86 N. W. 23; Coburn v. Board, 10 S. Dak. 552, 74 N. W. 1026; Greenly v. Hopkins, 7 S. Dak. 561, 64 N. W. 1128; State v. Lamm, 9 S. Dak. 418, 69 N. W. 592; Simon v. Matson, 25 Nev. 405, 61 Pac. 478; Wallace v. Oceanic Packing Co., 25 Wash, 143, 64 Pac. 938. Appeal prematurely taken not aided by fact that clerk entered order after appeal taken as of date prior thereto: Neeley v. Roberts, 11 S. Dak. 634, 80 N. W. 130. Appeal must be taken within sixty days in election contest cases: Murray v. Whitmore, 9 S. Dak. 288, 68 N. W. 745. The fact that appeal was taken before costs were taken and entered in judgment does not render appeal nugatory: Williams v. Wait, 2 S. Dak. 210, 39 Am. St. Rep. 768, 49 N. W. 209; Mauser v. Palmer, 2 S. Dak. 466, 50 N. W. 967.

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utes, or signed by the judge and filed,[14] and that an appeal taken prior thereto is premature, conferring no jurisdiction.[15]

In North Dakota, however, the time does not begin to run until notice to the losing party of the entry of judgment.[16] And in Washington, it is provided that an appeal from any order other than a final order, must be taken "within fifteen days after the service of a copy of such order, with written notice of the entry thereof upon the party appealing."[17] But no notice of entry of final judgment is required.[18] In New Mexico, the year from final judgment limited for appeal or writ of error does not begin to run till a determination of motion for a new trial, though judgment was entered on same day verdict was returned, under rule requiring it, where the party failed to give notice of intention to file motion for new trial.[19] In Utah, an appeal may be taken from a final judgment within one year after an order denying a motion for a new trial; and an exception to the verdict or decision on the

14 See Cal. Code Civ. Proc., § 1003, defining an order; ante, § 496; also, Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689.

15 See Estate of Rose, 72 Cal. 577, 14 Pac. 369; Estate of Sheid, 122 Cal. 528, 55 Pac. 328; McCormick v. Waulph, 11 S. Dak. 252, 76 N. W. 939.

16 Prescott v. Brooks (N. Dak.), 90 N. W. 129, holding also that the written notice of the entry of judgment which will set the time running against the right of appeal, was notice to appellant from his adversary; and it was also held that the service of a notice upon the respondent by the appellant did not amount to the notice to the appellant contemplated by the statute.

17 Ball. Wash. Codes & Stats., § 6602, construed in Otis v. Nash, 26 Wash. 39, 66 Pac. 111, to mean that the fifteenth day limitation does not begin to run until compliance with the statutory requirement of service of such written notice irrespective of the fact of the appellant's having actual knowledge otherwise of the entry of the order. But without noticing this case the opposite view was taken in the later case of Donison v. Spokane, 27 Wash. 317, 67 Pac. 561, on authority of the case of Braely v. Marks, 13 Wash. 224, 43 Pac. 27. No notice of entry or order required unless required by statute: Brooks v. Bigelow, 9 S. Dak. 179, 68 N. W. 286.

18 National Christian Assn. v. Simpson, 21 Wash. 16, 56 Pac. 844; McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56.

19 Pearce v. Strickler, 9 N. Mex. 46, 49 Pac. 727.

ground that the same is not supported by the evidence may be reviewed when the appeal is taken within sixty days after such order.[20]

The rule that a judgment must be entered before an appeal can be taken is not altered by the fact that the enforcement of the rule might deprive the appellant of the benefit of a review of the evidence as to its sufficiency. The fact that its enforcement might have that result is one for consideration of the legislature.[21] The full meaning of this proposition will be fully understood by considering the opinion in Wood v. Etiwanda Water Co.[22] But the difference between a right of

20 Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506, 50 Pac. 611.

21 Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726. See, also, Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Miller v. Wade, 87 Cal. 410, 25 Pac. 487.

22 122 Cal. 152, 54 Pac. 726. The opinion is a very learned and instructive explanation of authorities and code provisions, being in part as follows: "There is no motion for a new trial, and this appeal is from the judgment, which was not entered until more than seven months after the findings were filed; and it is now contended by respondent that the evidence contained in the bill of exceptions cannot be looked to upon this appeal, inasmuch as the appeal was not taken within sixty days after the rendition of the judgment. Under section 336 of the former Practice Act, the time for appeal ran from 'the rendition of the judgment'; and the 'rendition of the judgment is held to be its announcement by the court and entry upon the minutes of the clerk, or the filing of the findings and order for judgment': Thomas v. Anderson, 55 Cal. 45; Schurtz v. Roemer, 81 Cal. 247, 22 Pac. 657; Painter v. Painter, 113 Cal. 371, 45 Pac. 689. Section 939 of the Code of Civil Procedure changed the time for appeal from the judgment so as to run from the entry of the judgment; and under this provision it is held that an appeal from a judgment will not lie until after the judgment is entered, and if taken before, will be dismissed: Lorenz v. Jacobs, 53 Cal. 24; McLaughlin v. Dougherty, 54 Cal. 519; Home of Inebriates v. Kaplan, 84 Cal. 488, 24 Pac. 119, and many other cases. The same section (639) provides, however, as follows: 'But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed by an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment'; and it is held that the word 'rendition,' as here used, must be given the same meaning that was given to it under the Practice Act, and

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review for insufficiency and of error should not be overlooked. Errors, if properly presented, may be reviewed though the appeal be taken within the statutory period, though more than sixty days after the entry of judgment.[23]

that, therefore, the evidence could not be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the findings are filed: Schurtz v. Romer, supra; Painter v. Painter, supra. The result is, that a party in whose favor the judgment is 'rendered' (by the filing of findings and order for judgment) may effectually prevent a review of the facts upon an appeal from the judgment by delaying its entry for sixty days. These rulings are not inconsistent, as might appear at first glance, but necessarily result from the construction given to the word 'rendition' in the former Practice Act, and retaining that word in the code provision relating to the review of questions of fact, will change it to 'entry' in other appeals. The amendment of said section (Stats. 1897, p. 55) has not changed it in this respect. We see no reason for the distinction made by the statute and commend it to the consideration of the legislature. Appellant suggests that the evidence contained in the bill of exceptions may be looked at to explain or make clear the findings, but we think the findings must speak for themselves."

23 Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. In the first case the court said: "In this record we find what purports to be a statement on appeal, made after a motion for a new trial, upon the minutes of the court, and in that statement it appears that a motion for a nonsuit was made and denied, and an exception to the ruling of the court entered. This ruling is relied upon as error, and under the authority of Warner v. Darrow, 91 Cal. 309, 27 Pac. 737, it cannot be questioned but that an error of the trial court committed in granting or denying a motion for a nonsuit is an error of law, and, as such, can be reviewed on appeal from the judgment, even though such appeal is not taken within sixty days after the rendition thereof." In the second case, Miller v. Wade, 87 Cal. 410, 25 Pac. 487, was overruled in so far as it held that an appeal must be taken within sixty days, to insure a review of error in granting a nonsuit, the court saying: "The appeal in this case was taken more than sixty days after the rendition of the judgment of nonsuit, and the respondent insists that as the determination of the question whether the nonsuit was proper actually depends upon the sufficiency of the evidence to sustain the allegations of the cross-complaint, the appeal was not taken in time. This view finds support in the opinion of Mr. Justice Works in Miller v. Wade, 87 Cal. 410, 25 Pac. 487, but was not concurred in by a majority of the court in that case, and it cannot be sustained without overruling previous decisions in which it was uniformly held that the

In case of substantial amendment of a judgment, the time does not begin to run from the date of the original entry, but from the date of entry of the judgment as amended.[24] It is otherwise if the amendment be a mere correction of a clerical error.[25]

Section 1704 of the Code of Civil Procedure requires that all orders and decrees in probate proceedings "must be entered

ruling of a court upon a motion for a nonsuit presents a pure question of law, and is properly assigned as such on appeal from the judgment: Cravens v. Dewey, 13 Cal. 42; Donahue v. Gallavan, 43 Cal. 576; Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. 243." In Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. 243, the court said: "An error in granting a nonsuit is an error in law, and should be excepted to and specified as such. It cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. This is a ground for the review of questions of facts, not of law."

24 Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. 704; Mann v. Haley, 45 Cal. 63. An amendment of the judgment as entered, nunc pro tunc, so as to include therein the name of the omitted defendant as of the date of its original entry, cannot operate to deprive such defendant of his right of appeal from the judgment then entered against him for the first time: Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083. See quotation from this case, ante, § 527. In the first case here cited the court said: "The preliminary objection is made by respondent that the appeal from the judgment was taken too late, but this is obviously untenable. The original judgment was, indeed, entered December 1, 1897, and the notice of appeal filed June 2, 1898—one day over six months thereafter. But the judgment was amended December 27, 1897, and the latter must be taken as the true date of entry: Mann v. Haley, 45 Cal. 63; Bixby v. Bent, 59 Cal. 532."

25 Fallon v. Brittain, 84 Cal. 511, 24 Pac. 381: In this case the court said: "The court had the right at any time, in furtherance of justice, to authorize the correction of this mistake in the complaint—a mistake which was merely clerical, and did not go to the merits of the cause: See Code Civ. Proc., § 473, and cases cited in the note to the section in Deering's edition. And it had the right to correct clerical errors in its judgment, where it could be done from the record: Dreyfuss v. Tompkins, 67 Cal. 340, 7 Pac. 732; Swain v. Naglee, 19 Cal. 127; Freeman on Judgments, § 71, and cases cited. And this might be done even after an appeal and affirmance of the judgment: Rousset v. Boyle, 45 Cal. 64. And such correction did not operate to extend the time for taking an appeal from the decree: Savings etc. Soc. v. Horton, 63 Cal. 310.

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at length in the minute-book of the court"; and section 1715 of said code provides that an appeal "must be taken within sixty days after the order, decree, or judgment is entered." A decree is entered within the meaning of the last section when it is "entered at length in the minute-book of the court," as provided in section 1704; and an appeal taken before such entry is premature and vests the supreme court with no jurisdiction of the cause, and will be dismissed.[26] In Estate of Pearson [27] the court said: "A decree in this instance was signed by the judge November 24, 1896, and filed with the clerk on the following day, November 25th; but it was not entered in the minutes until December 14th following. The notice of appeal was served and filed November 30th, and the bond on appeal filed December 3, 1896. It thus appears that the appeal was perfected some eleven days prior to the entry of the decree, and was therefore premature. Appellant's counsel contends, however, that he was misled into taking the appeal thus early by an entry found on the clerk's register, which tended to indicate, and which he interpreted to mean, that the decree had been entered on November 25, 1896; but he contends that inasmuch as the register is an official record which the clerk is required to keep, in which the successive steps in the proceeding are to be correctly noted, and as this record is intended to inform appellant of the initial point of his right to appeal, it must be held to be conclusive of the facts it recites. But if such record would be held conclusive in any case where, as here, the actual entry of the decree is the fact which initiates the right before it could be held, it should appear that it was intended as a record of such fact. In this instance it appears without conflict that the entry in the register upon which appellants relied for their information had in truth no reference to the fact of the entering at length of the decree in the minute-book, and was not intended to record that fact; but that it referred to a wholly different step—an entry by the courtroom clerk, in his rough daily minutes of proceedings, of the

26 In re Rose, 72 Cal. 577, 14 Pac. 369; Home of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119; Menzies v. Watson, 105 Cal. 109, 38 Pac. 641.

27 119 Cal 27, 50 Cal. 929.

fact that the decree had been made and filed on November 25th. It further appeared that the appellant could readily have ascertained the true signification of such entry by inquiry in the clerk's office. The fact, then, that appellants were misled by said entry, through their failure to make inquiry, cannot give them rights which they otherwise have not. The objection that respondents are estopped by their acts from passing this motion cannot avail appellants, even if it be conceded that the facts show such estoppel. Where the appeal is premature, equally with where it is too late, this court has no jurisdiction to entertain it, and, upon the fact appearing, it will be dismissed of the court's own motion."

§ 533. How appeal taken—Sense in which filing and serving notice constitutes the taking of appeal—Relation to undertaking—Statutory changes.

The first matter to be noticed is the proper order to be observed, or relation between the things which, being done, constitute the taking of an appeal. And while, as before stated, the essential acts are the filing and service of the notice, yet these acts have such connection with the filing of the undertaking as to render necessary a consideration of the latter act also in this place.[28]

An inspection of the provision now in force, previously quoted, discloses the need for judicial construction. A literal

[28] The California decisions present some strange inconsistencies and misunderstandings as to prior decisions in the matter of proper precedence and time for taking the essential steps to constitute an appeal. It is now well settled that the undertaking must be filed five days after service of the notice. This is shown by authorities hereafter in this section cited. The learned Justice, who wrote the opinion in Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998, cited three cases to support an immature and somewhat irrelevant remark, not one of which gives it any sanction, at least one of them (Boyd v. Burrill, 60 Cal. 280) being contra. See, also, Columbet v. Pacheco, 46 Cal. 650; Dinan v. Stewart, 48 Cal. 567; People v. Ah Yute, 56 Cal. 119, dicta; Brooks v. Nevada Nickel Syndicate, 24 Nev. 264, 52 Pac. 575; explaining how it is practicable to file and serve notice same day. In Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98, and in Galloway v. Rouse, 63 Cal. 280, cited by him, the service preceded the filing by less than five days and the filing of notice and undertaking

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construction would seem to require two original notices, one to be filed and the other to be served, but it is silent as to what shall be done with the one served. The section then proceeds to state that "The order of service is immaterial," and then with no other punctuation than a comma, branches off to a subject so distinct as to suggest a different punctuation. But even with proper punctuation it would be at least difficult to determine what is meant by the words "the order of service" declared to be "immaterial." This section governs all civil actions. By reference, it governs, except as to the time for appealing in all appeals taken in probate matters.[29] The provision of the Practice Act of 1851 was much clearer. The subject of what constituted an appeal was exhausted in one section and that of the time thereafter for filing and excepting to undertakings in other sections. The section bearing upon the notice read as follows: "Sec. 337. The appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." Section 940 of the code was at least freer from ambiguity and uncertainty than as amended in 1874. As it first appeared it read as follows: "Sec. 940. An appeal is taken

were contemporaneous acts. There is a case, however (Hewes v. Carville Mfg. Co., 62 Cal. 516), where the notice was served August 30th; undertaking filed September 4th and notice filed September 18th, and the motion to dismiss was denied, owing to a misunderstanding of the court as to what the code really provided. The same question came up subsequently in Iverson v. Jones and Chalfant v. Jones, 5 Pac. 626, two apepals heard together January 26, 1885, and in an opinion of but a few lines the court said: "It is not a case of insufficiency in the undertaking, but is no undertaking at all." This language is quoted and these two cases expressly follow in Little v. Jacks, 68 Cal. 343, 8 Pac. 856; 9 Pac. 264, 11 Pac. 128, where the whole subject was gone over and the doctrine of Burkholder v. Byers, 10 Cal. 481, and other earlier cases followed and approved. Little v. Jacks was reheard in bank and the court adhered to its prior opinion. The court while repudiating the doctrine of Hewes v. Carville Mfg. Co., 62 Cal. 516, and practically overruling it, apparently affirmed it, owing to an incomplete and erroneous statement of its facts.

29 See Cal. Code Civ. Proc., § 1714.

by—1. Filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same or some specific part thereof; 2. Filing at the same time an undertaking on appeal; and 3. Serving a copy of the notice of appeal upon the adverse party or his attorney." [30]

By the amendment of 1874 the section was amended to its present form as previously quoted.[31]

Section 940, previously quoted, has been so invariably and confidently relied on and referred to as containing all the law on the subject, both by courts and counsel, that it may now be considered as settled that a certain act of 1861 was superseded by the code provisions. At any rate, the only inquiry of present practical importance is as to what constitutes a sufficient compliance with the present code provision, the decision thereunder having settled its meaning without reference to prior legislation.

Some of the earlier California decisions are still applicable to questions arising upon the proper practice herein. Only such as are still applicable or shed light upon the provisions of the present law will be noticed.

The Practice Act of 1851 provided, in addition to section 337 previously quoted, that the undertaking must be filed within five days after the notice of appeal was filed,[32] and that the respondent desiring to except to the sufficiency of the sureties should do so within five days after the filing of the undertaking. In Hastings v. Halleck,[33] where the notice had been served and then filed seventeen days thereafter, the court, in view of the above provisions held that the service should be made after, or at the time, of filing the notice, and before or at the time of filing the undertaking, saying: "The period of five days cannot be abridged by the error or negligence of the appellant; nor can the appellant, by serving a copy of the notice of appeal before the original is filed, keep the respondent continually watch-

[30] In Boyd v. Burrill, 60 Cal. 282, this amendment was erroneously referred to as having been made in 1880.

[31] See ante, § 532.

[32] § 348.

[33] 10 Cal. 31.

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ing the clerk's office to see when it is done. These provisions of the code are intended for the repose of parties, and must be strictly complied with. In this case the service of the notice of appeal was void, and there was no appeal perfected." The view taken in this and one or two other cases was that the filing of the notice was the principal thing and its service an incident; that the filing and not the service of a copy constituted the paper of which a copy was served a notice. Hence, the conclusion that the filing should precede, or be contemporaneous with, the service. This was pointed out in Buffendeau v. Edmondson[34] where the court said: "By this section of the statute the filing of the notice of appeal is made a constituent element of its character as a notice, and consequently must precede or be contemporaneous with the service of a copy of the notice on the adverse party, otherwise that which may purport to be a copy of a notice, or a duplicate thereof, fails to be such for the want of an original or counterpart." The court then discussed the various sections of the Practice Act before noticed, giving the same construction thereto as in Hastings v. Halleck, and said that this construction was rendered imperative in order to secure to the respondent the full five days from the filing of the undertaking within which to except to the sufficiency of the sureties. But compliance with the statute as thus construed was found burdensome and inconvenient and this led to the change made and which is now seen by comparison. The uncertain phrase, "The order of service is immaterial," is now accepted to stand for, rather than interpreted to mean, that, whether the notice be served before it is filed, or filed before service is immaterial, provided the notice be on file when the undertaking is filed. This requires that the notice be filed not later than five days after service, because the undertaking must be filed within five days after service,[35] and since, as has been previously shown, there has been no consummation of an appeal until the filing of the notice, there is not until then a proceeding pending in which to file an undertaking, and to file it would be a vain act. This view was very forcibly expressed by Jus-

34 24 Cal. 94, 96.

35 Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

tice Field in Burkholder v. Byers[36] on the motion to dismiss the appeal in these words: "The motion must be granted. Until an appeal is taken, there is nothing to give effect to the undertaking. If an appeal could be rendered effectual by an undertaking filed one month previously, it might be by an undertaking filed at any time previously within a year. And the undertaking, if of sufficient amount, must operate, if at all, to stay proceedings, and it would thus often happen that a stay would be obtained for the entire period during which an appeal is allowed, and no appeal in fact be ever taken. The filing of the notice of appeal must precede the filing of the undertaking."

There was a short period from the adoption of the Code of Civil Procedure until the amendment of 1874, during which the code provision,[37] as construed by the court, required the undertaking to be filed at the same time as the notice of appeal,[38] and that the notice must be served on the day of its filing,[39] and that all these acts might be at different hours on the same day, fractions of a day not being counted, but must be on the same day.[40] As the section is by the amendment of 1874 nof materially different, these authorities are referred to merely to call attention to the fact that they are no longer authoritative. But they were cited in People v. Ah Yute[41] as authority that the notice of appeal must be filed and served on the same day in criminal cases.

Some of the decisions subsequent to the amendment of 1874 it would be difficult to explain. That in Hewes v. Carville Mfg. Co.,[42] cited the case of Burkholder v. Byers,[43] in which Justice

36 10 Cal. 481. There is a misleading dicta in Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998, in these words: "The notice of appeal may be served before filing, and the code does not prescribe any particular time after service within which it must be filed." It must be construed in connection with what follows it, and with other authorities herein cited.

37 Cal. Code Civ. Proc., § 940.

38 See Columbet v. Pacheco, 46 Cal. 650.

39 Dinan v. Stewart, 48 Cal. 567; Columbet v. Pacheco, 46 Cal. 650.

40 Columbet v. Pacheco, 46 Cal. 650.

41 56 Cal. 119.

42 62 Cal. 516.

43 10 Cal. 481.

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Field so conclusively demonstrated the necessity for the notice being on file when the undertaking is filed, but without attempting to answer, and basing its conclusion upon changes in the statute referred to, decided that an appeal should not be dismissed where the notice was served and filed several days prior to the filing of the undertaking. The decision can hardly be explained by the fact that the court overlooked the amendment of 1874, and treated the section as first adopted in the code as still in force. There is nothing in the original section to justify the decision. It was not long permitted to stand unquestioned. It was overruled in Little v. Jacks,[44] but not without a misstatement of its facts, the doctrine of Burkholder v. Byers and subsequent cases in which it was adopted being reaffirmed.

§ 534. Form and requisites of notice.

An examination of the decisions discloses considerable leniency in ruling on motions to dismiss appeals during a brief period just prior to the taking effect of the codes on January 1, 1873. This is accounted for by the fact that in 1861 a statute was passed, which was never incorporated into the Practice Act or code, providing that "no appeal shall be dismissed for insufficency of the notice of appeal." This statute did not, however, excuse the filing and service of a notice of appeal in some form, and was construed merely to excuse defects of form and insufficiencies of substance, when a notice had been actually filed and served in proper time. It did not dispense with the requirement of the Practice Act that within the time limited therein a notice of appeal should be filed and served. In Buffendeau v. Edmondson,[45] the notice had been served three days

[44] 68 Cal. 343, 346, 6 Pac. 856, 9 Pac. 264, 11 Pac. 128.

[45] 24 Cal. 94, 97. For a case under the Act of 1861, where the notice erroneously described the judgment and order appealed from and yet was held sufficient. See Floteau v. Lubeck, 24 Cal. 364, 366, the court saying: "There is enough upon the face of this notice to show that the judgment and order mentioned in the transcript of the record were the same referred to in the notice." See, also, Estate of Pacheco, 29 Cal. 224, where a notice specifying one order made on a certain day and stating that an appeal was taken from that and all other orders made on the same day was held sufficient to cover all orders made on that day. In Genetta v. Relyea,

before filing, which was a departure from the requirements of the Practice Act. Upon motion of the respondent the appeal was dismissed for that reason. A petition for a rehearing having been filed, the court, after quoting the statute of 1861, denied the same and adhered to its former decision, saying: "It is insisted by defendant's counsel that this court has not the power to dismiss an appeal for insufficiency of the notice, and for that reason the judgment of dismissal should be vacated and the cause restored to the calendar. The section of the act of 1861 above cited presupposes the existence of a notice of appeal, to which the word 'insufficiency' stands in qualifying relation. The question of the insufficiency of the notice was not involved in the determination of the motion to dismiss the appeal; but the point made by the party moving, and which was considered by the court, was that the proceedings, which the three hundred and thirty-seventh section of the Practice Act requires shall be taken in order to constitute an appeal, had not been taken. The construction which the counsel claims for the act of 1861 would give it the effect to abrogate the conditions on which the fact of a subsisting appeal must of necessity depend. In our view, the act of 1861 was intended to relieve appellants from the results which, without it, would be likely to happen in consequence of defects of form and deficiencies in substances apparent on the face of notices of appeal; but we cannot find in this act any authority for excusing, in any case, performance of the acts necessary to effect an appeal in accordance with the provisions of the three hundred and thirty-seventh section of the Practice Act—viz., the filing and service of notice—and without the performance of which acts the appellate court could not acquire jurisdiction."

There was once a difference of opinion as to whether the act of 1861 was repealed by the adoption of the Code of Civil Procedure.

32 Cal. 159, and Gates v. Walker, 35 Cal. 289, the notices were held too general, notwithstanding the Act of 1861. And in Day v. Callow, 39 Cal. 593, 597, it was held that a notice of appeal from "all the orders and rulings occurring on the trial, and excepted to by the defendant" did not constitute notice of appeal from an order on motion for a new trial.

The courts still exercise considerable liberality in the same matter, so that the question is of but little importance. The said act is rarely referred to.

No form of notice is prescribed; but it must convey with reasonable certainty information of the particular judgment or order from which an appeal is taken and when the appeal is from part only, that part should be distinctly specified. Slight defects and omissions are disregarded where no prejudice therefrom is shown. The following were held not to be invalidate the notice: Failure to address it to the parties to be served, where addressed to the proper attorney.[46] Where the defendants gave notice that they appealed "from the order of the court the motion of said defendants for a new trial," this was held sufficient designation of the order, it being apparent that the omission of the word "denying" was simply a clerical error.[47] A notice designating an order by its date merely was held sufficient.[48] The mention in the notice of nonappealable orders does not vitiate a notice otherwise sufficient.[49] And if otherwise sufficient, a clerical error in stating that the judgment appealed from is in favor of the plaintiff when in fact it is in favor of defendants, will be disregarded.[50] A notice failing to state details, but correctly stating the date of the entry of a judgment, was held sufficient.[51] Where the order appealed

46 Estate of Nelson, 128 Cal. 242, 60 Pac. 772. Notice addressed to an attorney for but one prevailing party sufficient, where in fact he was attorney for all of them: In re Murphy's Estate, 26 Wash. 222, 66 Pac. 424.

47 Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231.

48 In re Day, 18 Wash. 359, 51 Pac. 474. To same effect, Shannon v. Consolidated Tiger & Poorman Min. Co., 24 Wash. 119, 64 Pac. 169. On the other hand a notice, which states the nature of the action, the parties, the title of the court, and the judgment rendered, is sufficient to confer jurisdiction, though it fails to designate the time when the judgment was rendered: State v. Hanlon, 32 Or. 95, 48 Pac. 353.

49 Bryant v. Davis, 22 Mont. 534, 57 Pac. 143; Brown v. Edmonds, 5 S. Dak. 508, 59 N. W. 731; Granger v. Roll, 6 S. Dak. 611, 62 N. W. 970. Omission of name of party from notice, held not fatal: Marshall v. Mining Co., 3 S. Dak. 473, 54 N. W. 272.

50 Taylor v. McCormick (Idaho), 64 Pac. 239.

51 Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805.

from was otherwise sufficiently identified, it was held that entitling the notice as of the wrong county did not vitiate it.[52] And where there is but one court to which the appeal can be taken, the failure of the notice to name the court to which the party appeals is immaterial.[53]

As a rule, independent appeals from separate appealable orders or judgments cannot be taken by one and the same notice.[54] But only one notice of appeal is necessary, though a separate judgment is entered in favor of each defendant on the challenging of the sufficiency of the evidence, there being, so far as plaintiffs are concerned, but one final judgment.[55] And it is well settled that an appeal may be taken jointly from a judgment and order denying a motion for a new trial entered after the judgment.[56] Where the appeal is from only a part, or from parts of a judgment, such parts should be clearly

52 Estate of Damke, 133 Cal. 433, 65 Pac. 888. So a mistake in the date of an order otherwise sufficiently identified is immaterial: Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 893. Especially if the record on appeal shows that there was but one order or judgment of the kind entered in the cause: Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510; McConnell v. Spicker, 13 S. Dak. 406, 83 N. W. 435.

53 Starweather v. Bell, 12 S. Dak. 146, 80 N. W. 183.

54 Prondzinski v. Garbutt, 9 N. Dak. 239, 83 N. W. 23; Anderson v. Hultman, 12 S. Dak. 105, 80 N. W. 165.

55 Clark v. Eltinge, 29 Wash. 215, 219, 69 Pac. 736. In this case Justice Fullerton delivering the opinion said: "The respondents move to dismiss the appeal for the reason that but one notice of appeal was given. It is argued that, inasmuch as there was a separate judgment in favor of each defendant, that the two distinct notices of appeal were necessary, each specifying the particular judgment from which the appeal is taken. We think, however, that the objection is not well taken. Two distinct appeals could not have been taken and prosecuted by the appellants from the several judgments rendered. So far as the appellants are concerned, there was but one final judgment, and but one notice of appeal was necessary, although that judgment may have consisted of several parts."

56 Kountz v. Kountz, 15 S. Dak. 66, 87 N. W. 523. See, also, post, §§ 650, 655, 665.

distinguished in the notice from the parts from which the appellant does not intend to appeal.[57]

A notice is clearly insufficient which fails to designate any order of which a review is sought,[58] or designates it so defectively that it cannot be readily identified.[59]

In Washington two methods of giving notice of appeal are provided for by statute. Notice may be given in open court at the rendition of the judgment, or in writing within a specified time at the election of the appellant. The notice, when given in open court, must be entered in the minutes. The sufficiency of the notice is tested, however, by the same principles whichever method be adopted.[60] In Oregon the statute requires the

57 See In re Barker's Estate, 26 Mont. 279, 67 Pac. 941.

58 Steuffen v. Jefferis, 9 Mont. 66, 22 Pac. 152.

59 Hamilton v. Butler, 33 Or. 370, 54 Pac. 200; Crawford v. Wist, 26 Or. 596, 39 Pac. 218; Duffy v. McMahon, 30 Or. 306, 47 Pac. 787.

60 See Ball. Codes & Stats., Wash., § 6503; Bingham v. Keylor, 25 Wash. 156, 64 Pac. 942; Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773. That party may elect, see Cole v. Price, 22 Wash. 18, 60 Pac. 153; Seattle (City of) v. Liberman, 9 Wash. 276, 37 Pac. 433. In the last case here cited the court said: "A motion was made to dismiss this appeal on the ground that all the parties to the action had not been served with notice thereof, which is based upon the fact that a written notice was given which had not been served upon all of the parties entitled to service under the statute. It appears, however, that an oral notice of appeal was regularly given in open court after the rendition of judgment, and an appeal bond was given within the time required thereafter. Consequently, the written notice was superfluous, and the motion is denied." In Ranahan v. Gibbons, supra, the following appears in the opinion: "On April 20, 1900, at the close of the trial in this cause, the following entry was made by the clerk in the court records: 'The court, being fully advised, finds for plaintiff, and renders judgment for plaintiff as against Gibbons, and his rights to be protected as against White. Action as to Walker dismissed. To which ruling the defendants excepted in open court. Exception allowed, and defendants in open court gave notice that they intended to appeal to the supreme court of Washington from said judgment.' The statement of facts, certified by the judge who tried the cause, shows that at the close of the trial the defendants excepted and gave notice in open court of an appeal to the supreme court. On April 21, 1900, the following entry was made by the clerk in the court records. 'Findings of facts and conclusions of law and decree

notice to specify the errors; and a reasonably certain assignment must be contained in the notice, in order to confer jurisdiction upon the appellate court.[61]

§ 535. Signature to notice—Herein as to authority of attorney.

Whatever may have been the former views on the subject, it is now well settled that an appeal may be taken for a party by an attorney other than the attorney of record in the trial court, and without a substitution. This results from the well-established character of an appeal as a new and independent proceeding, to be so treated for most purposes. In this respect the

herein were this day signed by the court. Immediately upon the signing of the above, defendants again gave notice in open court that they intended to appeal from said findings and conclusions and decree from the record and proceedings in said cause, to the supreme court of Washington, and said notice of appeal is hereby entered. And upon motion of defendants the court fixed the appeal bond at two thousand dollars.' We think from this entire record it is manifest that the words 'intended to' were inadvertently entered by the clerk in the court records; that the words 'and said notice of appeal is hereby entered,' in connection with 'and upon motion of defendants the court fixed the appeal bond at two thousand dollars,' lead to that conclusion. If we are correct in this, there has been a sufficient compliance with the law relative to giving notice in open court of an appeal to the supreme court. It is not necessary for the record to recite that the court directed the clerk to make the entry of notice of appeal; that will be presumed from the fact that the entry has been made."

61 Deuch v. Seaside Lodge, 26 Or. 385, 38 Pac. 337. The notice is treated as process and the assignment of errors therein as a pleading. In this case the court said: "The statute requires the appellant to specify in his notice the grounds of error upon which he intends to rely upon appeal from a judgment of the circuit court rendered in an action at law: Hill's Code, § 537. The assignment of errors in a notice of appeal from a judgment rendered in an action at law is the pleading, and the service of such a notice upon the respondent is the process which confers upon the appellate tribunal jurisdiction of the person of the respondent and subject matter of the action. What the statute has required is a condition precedent to the right of appeal, and the failure to specify in the notice the grounds of error upon which the appellant intended to rely upon appeal, gave this court no jurisdiction of the subject matter, and for this reason the appeal is dismissed."

STANFORD LAW LIBRARY

function of the writ of error of the common law, for which appeal is a substitute, adheres to the latter.[62] The same view of the character of an appellate proceeding in connection with the validity of a notice of appeal signed by other attorneys than those of record from that above expressed was taken in an Oregon case,[63] where the whole subject was ably considered by Justice Thayer, delivering the opinion of the court, in overruling a former decision,[64] in the course of which he said: "The constitution of this state only vests this court with jurisdiction to revise the final decisions of the circuit courts. Finality must be put to the suit by the circuit court before an attempt can be properly made to have the decision therein revised here. And the review by this court of such decision, whether it be had upon exception taken at the trial or hearing in the circuit court, or upon facts found by that court, or which come here by the depositions of witnesses, is for the purpose of de-

62 McDonald v. McConkey, 54 Cal. 143. In this case the point introduced above was raised but not decided, the court holding the objection to have been waived by a stipulation to the correctness of the transcript signed by the attorneys. The case was cited as authority on this point, however, in Buell v. Buell, 92 Cal. 393, 396, 28 Pac. 443, where the point was raised as to the authority of allowing other than those of record without a substitution in a motion to recall an execution, the court saying: "We see nothing in this point. The motion was a new and original proceeding, as much so as would have been an action to review the order of the court, directing the issue of the writ, and the respondent had full power to employ such attorneys as he might choose to conduct it." In Shirly v. Birch, 16 Or. 1, 12, 18 Pac. 344, the court, in denying a motion to dismiss the appeal because the notice was not signed by the attorneys of record in the lower court, said: "The grounds upon which it is made are purely technical, neither of them affecting in the remotest degree any of the rights of the respondents. It certainly does not matter to them a particle whether the appeal was taken by the former attorneys of the appellant or the present ones, nor whether the change of attorneys was made by regular substitution upon the record or otherwise; and the persistent and untiring efforts of the respondents' counsel to induce the court to dismiss the appeal, and thereby deny the appellant a hearing in this court upon an important matter, appears to me like a deplorable waste of energy."

63 Shirley v. Birch, 16 Or. 1, 4, 18 Pac. 344.

64 Appleton v. Nelson, 10 Or. 437.

termining whether the decision is erroneous or not; and if found to be so, either in actions at law or in suits in equity, when tried by the court, the judgment or decision is reversed and the case remanded for a new trial; or if found to be erroneous as to findings of facts this court will adjudge what decrees should be given, and remand the case, with directions that it be entered as the decree of that court. Commencing an action or suit in a circuit court, and conducting it to a final termination there, and taking an appeal to review a judgment or decree in this court, are distinct proceedings. The first one is to recover a judgment or decree. The second one is to revise a judgment or decree. The latter proceeding combines the nature of both appeal and writ of error as heretofore known; but in its operation and effect is more in the nature of the latter than the former. Its office is to correct errors, including both errors of law and findings of fact. A writ of error was always regarded as a new proceeding. And it was held in chancery that another solicitor than the one who commenced the suit could be employed to take an appeal from the decree of the vice-chancellor to the chancellor without any order of substitution." The views here expressed are in consonance with those held by the New York courts.[65] The reason given in the earlier Oregon case, why an attorney of record alone had authority to give a notice of appeal, seems to have been put upon the ground that such notice could be served upon him. Continuing, and speaking with reference to this reasoning, the learned justice, in Shirley v. Birch, said: "This reasoning is not at all satisfactory to my mind. The code, by authorizing the service of the notice of appeal upon the attorney of record, if it does authorize any such service, does not necessarily authorize the attorney of record to give a notice of appeal. The code might have authorized the notice of appeal in such case to be served upon the clerk of the court, but that would not have given the clerk authority to give a notice of appeal."

The statutory provisions, where there are any, of different states vary somewhat on the subject of the substitution of at-

[65] See Tripp v. De Bow, 5 How. Pr. 114; Schuler v. Maxwell, 38 Hun, 240.

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torneys, that of California, for instance, providing for a substitution "at any time before or after judgment or final determination,"[66] while that of Oregon only provides for a change of attorneys "at any time before judgment, or decree, or final determination."[67]

The courts sometimes advert to such statutes in discussing the subject of the proper signature to notices of appeal, but such provisions are not thought to affect the question, the independent character of the appellate proceeding being considered determinative. The view contrary to that now established proceeded upon the illogical course of reasoning that if an appeal be a new proceeding, under the system of practice acts the attorney of record in the trial court would be unauthorized to take an appeal in the absence of a new employment. A complete answer is that courts have nothing to do with the fact of employment or authorization of attorneys, until their authority is put in issue by an appropriate suggestion supported by evidence of the want of authority, without which the authority of the attorney, whether the attorney prosecuting the appeal be that of record in the lower court or another, is presumed. If any doubt upon this question remained, it was set at rest, so far as California is concerned, in Woodbury v. Nevada etc. Ry. Co.,[68] where the court said: "When the notice of appeal from a judgment is signed by an attorney of this court, he will be presumed to have had authority from the appellant, and, unless the appellant himself objects to the prosecution of the appeal, it will not be dismissed at the motion of the respondent upon the ground that it is prosecuted against the will of the appellant. The court will not pass upon the weight or sufficiency of conflicting affidavits for the purpose of determining whether the appellant desires the appeal to be dismissed." And a similar view is taken in Washington.[69]

66 Cal. Code Civ. Proc., § 284.

67 Code of Oregon (1874), § 1010.

68 120 Cal. 367, 369, 52 Pac. 650. The signature to a notice of appeal is valid when made by another by authority of the attorney: Woods v. Walsh, 7 N. Dak. 376, 75 N. W. 767.

69 See Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580, construing Ball. Codes & Stats., §§ 6503, 4769, 4770.

A notice of appeal to the supreme court, which is signed by the attorney of record in the court below, is not ineffectual because the attorney has not been admitted to practice in the supreme court, provided he is qualified to act as attorney of record in the lower court.[70]

If the appellant has two attorneys of record in the lower court, or a firm of attorneys, either one of the two, or either member of the firm, may sign the notice of appeal.[71]

In the case of the Bank of California v. Shaber,[72] it appeared that a proper committee of the board of supervisors of the city and county of San Francisco had, by authority of the board, taken up and considered the question of whether an appeal should be taken from a judgment against said city and county, had conferred with the attorney and counsellor and concluded not to appeal. Thereafter and before any notice of appeal was given, the board ordered the judgment paid. Upon this showing it was held that the appeal could not be maintained, the court holding that this affirmative act of the board was within its proper province, and terminated the authority of the attorney and counsellor, as well as its rights to appeal.

Any conclusion to the effect that the attorney of record alone has authority to give the notice, without a substitution based upon the requirement that the notice must be served on the attorney of record for the adverse party is without force and it is conclusively answered in the above quotation from Shirley v. Birch.[73] It follows that one may prosecute an appeal by an attorney other than the one of record in the lower court, without a substitution, or in propria personam regardless of whether he was represented by an attorney in the lower court.

A distinction must be remembered between notices of appeals and notices of motions for new trial. As has been previously shown, the attorney of record must sign the latter.[74]

[70] Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310; Taylor v. McCormick (Idaho), 64 Pac. 239.

[71] Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.

[72] 55 Cal. 322.

[73] 16 Or. 1, 4, 12, 18 Pac. 344.

[74] See ante, § 370.

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The notice of appeal in a criminal case may be signed by either the attorney general of the state or by the district attorney. The attorney general has a supervisory and controlling power with respect to appeals, given him by statute, but there is nothing in any statute which makes his authority so exclusive as to warrant the dismissal of an appeal on motion of the adverse party merely because taken by the district attorney, rather than the attorney general. There is no doubt, however, of the authority of the attorney general to dismiss an appeal so taken.[75]

§ 536. On whom notice to be served.

The question of who are proper parties respondent on appeal, postponed for discussion to this head, resolves itself into the question of designating those on whom the notice of appeal should be served. The question turns to a great extent upon the construction to be given the words "adverse party" in the statute. In this matter the appellant cannot choose for himself against whom he will proceed for a review on appeal; he must conform to the requirements of the statute. The relative positions of the parties upon the record of the lower court may, or may not, be determinative of the question. It is often determined by other circumstances.

The provision of the California Code of Civil Procedure, before quoted, is that the notice shall be served "on the adverse party or his attorney." These words were in the Practice Act as first enacted in 1851, and have been retained without change down to the present.

§ 537. Meaning of term "adverse party" as used in statutes.

The term "adverse party" includes every party who will be adversely affected by a reversal or modification of the judgment or order appealed from.[76] This construction was

75 See Sacramento (County of) v. Central Pac. R. R. Co., 61 Cal. 250; Cal. Pol. Code, § 470.

76 Service on the party, after service upon the attorney is a nullity: Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

placed upon the language in Senter v. De Bernal,[77] and that case has stood the test of review in later cases in California and elsewhere. The action in that case was for partition of real property. Sixty-eight persons were parties of record, eleven as plaintiffs and the remainder as defendants. Only five of the defendants, however, actually and formally contested the action. These five moved for a new trial and appealed from an order denying it, and from the whole of the judgment. The notice of motion for new trial was addressed to the nominal plaintiffs, but not to the codefendants of the appellants, or

[77] 38 Cal. 637, 640, approved in First Nat. Bank v. Bernard, 4 Colo. 72; McKittrick v. Pardee, 8 S. Dak. 41, 63 N. W. 23. Parties held to be adverse and entitled to notice within the rule stated above as follows: An intervener upon a decree foreclosing mortgages: Hinchman v. Point Defiance Ry. Co., 14 Wash. 171, 44 Pac. 152; Miller v. Richards, 83 Cal. 563, 23 Pac. 936; the county in action against county, its sheriff and treasurer: Stuller v. Baker County, 30 Or. 294, 47 Pac. 705; receiver of insolvent corporation appointed on petition of creditors, appeal from decree adjudging certain claims barred by statute of limitations: Pacific Coast Trading Co. v. Bellingham Bay, B. Assn., 18 Wash. 245, 51 Pac. 382; joint defendant upon appeal from judgment against them jointly: Lydon v. Godard (Idaho), 51 Pac. 459; Lewiston Nat. Bank v. Tefft (Idaho), 53 Pac. 271; Dewey v. Southside Land Co., 11 Wash. 210, 39 Pac. 368; the other defendants where execution issued against all quashed, upon appeal from order by judgment creditor: Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641; person sought to be substituted for defendant, upon appeal from order refusing to substitute: Toy v. San Francisco etc. R. R. Co., 75 Cal. 542, 17 Pac. 700; receiver on appeal from decree foreclosing a mortgage, where there was deficiency judgment: Roche v. Stanley, 15 Utah, 314, 49 Pac. 648; intervener in mechanic's lien suit, though intervening without leave of court, there being no motion to strike out his complaint in intervention: Gray's Harbor Commercial Co. v. Watton, 14 Wash. 87, 43 Pac. 1095; intervener whose complaint was answered: Fairfield v. Binnian, 13 Wash. 1, 42 Pac. 632; sureties upon bond for possession of property taken on execution where judgment on the bond against principal and sureties: Carstens v. Gustin, 18 Wash. 90, 50 Pac. 933. Joint claimants in foreclosure of mechanic's lien, notwithstanding payment of their claims after service of notice of appeal on other claimants: Osborn v. Rogers, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; conflicting claimants claiming priorities in foreclosure suit: Power (T. C.) etc. v. Murphy, 26 Mont.

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any of them, and was served upon the nominal plaintiffs only. The notice of the appeals was addressed to the plaintiffs and the codefendants of the appellants, but was served only upon the plaintiffs. In passing upon a motion to dismiss the appeals and sustaining it, the court said: "In support of the motion, it is argued that the appeal involves either a reversal or modification of the final judgment, neither of which can be granted, from the nature of the case, without affecting or disturbing the rights of those defendants who have been made parties to the appeal, and over whom, therefore, this court has no jurisdiction: that in actions of this character all persons who are interested in the estate to be divided are actors as against each and every other, whether they appear upon the face of the record as plaintiffs or defendants, and each therefore, as to every other,

387, 68 Pac. 411; joint obligors on bond upon which judgment rendered: Hopkins v. Satsop Ry. Co., 18 Wash 679, 52 Pac. 349; parties to the action appearing where actions consolidated: Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654; assignee in insolvency, upon appeal from order refusing to set aside sale and order sale in parcels: Vincent v. Collins, 122 Cal. 387, 55 Pac. 129; co-defendants affected by order granting nonsuit from which appeal taken: Bullock v. Taylor, 112 Cal. 147, 44 Pac. 457; parties of record affected by order settling account of administrator: Estate of Bullard, 114 Cal. 462, 46 Pac. 297; legatees upon appeal from order denying a new trial in probate matter: Estate of Scott, 124 Cal. 671, 57 Pac. 654; purchaser at sale upon appeal from order confirming sale by executor: Estate of Bell, 125 Cal. 539, 58 Pac. 153; defendants dismissed from action where appeal by codefendants: Casey v. Oakes, 13 Wash. 38, 42 Pac. 621.

Parties held not adverse in the sense of being entitled to service as follows: Defendant disclaiming interest by answer: Smalley v. Langenour (Wash.), 70 Pac. 789; defendant not appealing, against whom judgment will stand though it should be reversed as to the defendant appealing, and whose interests cannot be in any way affected by the appeal: Jackson v. Brown, 82 Cal. 275, 23 Pac. 142; to same effect, Sutton v. Apex etc. Min. Co., 12 S. Dak. 576, 82 N. W. 188; nonappealing defendants in street assessment case: Foley v. Bullard, 97 Cal. 516, 32 Pac. 574; codefendants of cross-complaining defendants, where action dismissed before cross-complaints were filed: Hinkel v. Donahue, 88 Cal. 597, 26 Pac. 374; unnecessary party to action: Hand Mfg. Co. v. Marks, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; codefendant who has made separate motion for new trial upon appeal from order denying

is an 'adverse party' within the meaning of the law in relation to appeals, and, therefore, entitled to be made a party to and notified of all proceedings taken by any one of them for the purpose of changing or in any respect affecting the final judgment of the lower court. The code provides that any party aggrieved by the judgment of the district court may appeal, and the party appealing shall be known as the appellant, and the adverse party as the respondent. By 'any party' is to be understood, as we consider, any person who is a party to the action. The appeal may be taken by filing a notice with the clerk, and serving a copy upon the adverse party or his attorney. The question is as to the meaning of the words 'adverse party' as here used, and as to that we think there can be no rational doubt. Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party' within the mean-

motion: Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231; codefendants as to whom action dismissed upon appeal from judgment: Bliss v. Grayson (Nev.), 59 Pac. 888; codefendants on appeal from order denying motion to vacate judgment who concedes the judgment to be correct as to themselves but not as to the moving and appealing defendant: Blyth etc. Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; stockholder, the judgment being several against him and appealing stockholders: Aulbach v. Dahler, 4 Idaho, 522, 43 Pac. 192, 43 Pac. 322; grantor on appeal from judgment in action to set aside conveyance in fraud of creditors: Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; contractors to whom material furnished in mechanic's lien suit: Osborn v. Logus, 28 Or. 302, 38 Pac. 190, 37 Pac. 456; 42 Pac. 997; trustee who has mortgaged property of beneficiary and defaulted in foreclosure suit against them jointly, appeal by beneficiary: Alliance Trust Co. v. O'Brien, 32 Or. 333, 50 Pac. 801, 51 Pac. 640; some of tenants in common appeal from decree against them to quiet title by others, the interests of the tenants being distinct and several: South Portland Land Co. v. Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; coplaintiff on appeal from decree in mechanic's lien suit, interests being distinct: Watson v. Noonday Min. Co., 37 Or. 287, 55 Pac. 867, 58 Pac. 36, 60 Pac. 994. In an action against several defendants to determine priorities in the use of water from a river for irrigation purposes, and for an injunction, where separate judgments are asked, and plaintiffs bring a writ of error to review a judgment for one defendant, the others need not be made parties: Egan v. Estrada (Ariz.), 56 Pac. 721.

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ing of those provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener. . . . . Our code allows any and every party who is aggrieved to appeal without joining anyone else, no matter what may be the character of the judgment against him, whether joint or several, and, in this respect, works a change from a former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also."

The foregoing opinion is an exposition of what had been a well-settled rule of construction and practice for many years. Such was declared to be the meaning of the same language as used in the statutes and rules of the court of chancery of New York prior to the adoption of the code in that state. In Thompson v. Ellsworth,[78] Chancellor Walworth said: "The adverse party, within the intent and meaning of the eightieth section of the statute relative to writs of error and appeals, and of the one hundred and sixteenth rule of this court, means the party whose interest in relation to the subject of the appeals is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal."

The case of Blanc v. Rodgers[79] contains nothing inconsistent with Senter v. De Bernal. In Blanc v. Rodgers the court held, in effect, that there was a misjoinder of parties defendant; that the interest or claim of the defendant not served with the notice of appeal should have been asserted in a separate action, and hence the earlier case was not in point. But, even with the distinction there noted, the view of the court is not in line with that taken in later cases presently to be noticed.

78 1 Barb. Ch. 627. See, also, Coates v. Carroll, 38 How. Pr. 436.

79 47 Cal. 606.

In the case of In re Marbury,[80] it was said that on an appeal from an order of the probate court removing a guardian of an estate, and appointing another in his stead, the newly appointed guardian was a necessary party to the appeal, because, if the order should be reversed, the last appointee would be displaced. Reed v. Allison[81] was, like Senter v. De Bernal, an appeal from a judgment in a partition suit, where the adjudicated rights of all the parties would be affected by a reversal of the judgment of the lower court, and is in line with Senter v. De Bernal and other cases which follow and approve it.

But while the rule itself is well settled, and generally understood, its proper application is often a matter of considerable difficulty, as is evidenced by the frequency with which cases involving its discussion have been presented in the appellate courts. The principle was applied on appeal from a judgment discharging the plaintiff from a trust in favor of creditors and others. One of the creditors appealed, serving his notice upon the trustee, but not upon his codefendants, some of whom, like the appellant, had contested the action. The appeal was dismissed.[82] The principle was explained in Williams v. Santa

[80] 48 Cal. 83. In Estate of Scott, 124 Cal. 671, 674, 57 Pac. 654, where the court said: "The notice of appeal which was given November 2, 1898, was directed to the proponents of the will and their attorneys, but did not purport to be a notice to any of the legatees or devisees under the will. As the effect of the reversal of the order admitting the will to probate would be to deprive the legatees of whatever interest in the estate of the decedent is given to them by the will, it is evident that they are interested in maintaining the order appealed from, and are, therefore, adverse parties to the appellant upon this appeal. The respondents concede that the notice was served upon those legatees who had appeared at the hearing upon the contest, with the exception of the Protestant Orphan Asylum, for whom an appearance had been made by George W. Haight, as its attorney; but it is not shown that there was any service made upon this legatee or its attorney. As no service of the notice of appeal was made upon this legatee, it cannot be bound by any order or judgment made upon the appeal, and this court is therefore without jurisdiction to hear the appeal, even as between the other parties."

[81] 61 Cal. 461.

[82] O'Kane v. Daly, 63 Cal. 317, 319. To same effect, Jones v. Quantrell, 2 Idaho, 153, 9 Pac. 418.

STANFORD LAW LIBRARY

Clara Min. Assn.[83] The decree appealed from provided that the proceeds of the sale of certain property of the defendant mining association should be applied in a certain specified manner so as to give the plaintiff a preference over certain co-defendants, the latter not having been served with the notice of appeal. The court took occasion to give a more luminous and comprehensive statement of the principle with its qualifications than had been previously attempted. The court, deciding that under the circumstances it had jurisdiction to pass upon the merits of the appeal, because only a modification which could not prejudice the other defendants was sought, said in part: "It is contended by respondent, the plaintiff, that this court has no jurisdiction to disturb the judgment, the necessary parties not having been served with notice of appeal. This court has no jurisdiction to hear an appeal from a judgment, unless the appellant shall have served a notice of appeal on all of the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment; or, where the appeal is from part of a judgment, by a reversal of the part appealed from. And where the appeal is from the whole judgment, this court has no jurisdiction to modify the judgment in such a manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and finally determined by the judgment." The case of Dick v. Bird[84] was an application of the same principle to appeals from part of a judgment as where taken from the whole. In that case the objections made by the appellants to the portion of the judgment appealed would have been equally effective against the whole judgment had it been appealed from. In giving reasons for not considering that appeal, the points raised by the appellant (there being no motion to dismiss), Chief Justice Beatty, delivering the opinion, after noting certain objections of the appellants to the judgment, said: "These are objections which go to the whole judgment and would, if sustained, reverse it completely, not only as against these respondents, Dick and Horton, but also as to numerous other parties whose rights have been litigated in the ac-

83 66 Cal. 193, 194, 5 Pac. 85.

84 14 Nev. 163.

tion and established by the decree, but upon whom no notice of appeal has been served. A notice of appeal must be served upon the adverse party or his attorney, and must state whether the appeal is from the judgment or a part thereof. If the appeal is from the whole judgment, every party whose interest in the subject matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment, is an 'adverse party' in the sense of the code, and is entitled to notice of the appeal. For two reasons, then, there is in this case no appeal which would authorize us to reverse the whole judgment, even if we thought the objections of appellants were well founded. The notice of appeal specifies only a part of the judgment, and it was served only upon the parties whose interests would be affected by a reversal or modification of the part specified. We have no jurisdiction over the other parties, or over the judgment, so far as it affects them." And many other cases could be reviewed upholding and applying the rule, some of which are given below.[85]

But it is obviously stating the rule too broadly to say, as is said in some of the cases, that every party who would be affected by a reversal or modification must be served. The term "adverse party," in designating the appellant and respondent on appeal, cannot, without absurdity, be held to include one who would be benefited by a reversal or modification, but

85 See In re Castle Dame etc. Co., 79 Cal. 246, 21 Pac. 746, holding notice necessary on appeal by petitioning creditors from order dismissing insolvency proceedings, although respondent then in default: Millikin v. Houghton, 75 Cal. 541, 17 Pac. 641, holding service necessary on all judgment debtors on appeal by judgment creditor from order quashing execution: Harper v. Hildreth, 99 Cal. 267, 33 Pac. 1103; same ruling as to plaintiff's (appellant's) failure to serve original defendant on appeal from judgment as to new defendants brought in in reference to claim to property involved: Lancaster v. Maxwell, 103 Cal. 68, 36 Pac. 951, as to appeal by owner in mechanic's lien suit without serving codefendant contractor, and holding such service necessary: Moody v. Miller, 24 Or. 181, 33 Pac. 402, where service on wife codefendant with husband (appellant) in suit to foreclose mortgage on his land, necessary though in default: Commercial Bank v. United States etc. Bank, 13 Utah, 197, 44 Pac. 1043, as to new codefendants brought in on cross-complaint of defendant afterward appealing.

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only those whose interests clearly are, or may be, affected prejudicially. This was illustrated and lucidly explained in The Victorian.[86] In that case judgment was against both the principal and sureties upon a forthcoming bond. The principal alone appealed without serving the notice of appeal upon the sureties. Chief Justice Lord, delivering the opinion, said: "Upon this state of the case, plaintiffs have moved to dismiss the appeal upon the ground that Thompson and Troupe are so connected in the judgment, and would be so affected by its modification or reversal, that they are as to the plaintiffs or defendants an 'adverse party' within the meaning of the statute in relation to appeals, and, therefore, necessary parties to give the appellate court jurisdiction to revise or reverse it. Our code provides that 'any party to a judgment or decree . . . . may appeal,' and that 'the party appealing is known as the appellant, and the adverse party as the respondent': Section 536. 'Any party' evidently refers to any person who is a party to the action. To take an appeal it is required that 'the appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon, with the clerk': Section 537. Who, then, is 'an adverse party,' within the meaning of these provisions of the code, upon whom the notice of appeal must be served? Evidently every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal. Such has been declared to be the meaning of the words 'adverse party' as used in the statute of other states. The notice must be served on all parties whose interests are adverse to the party appealing. The question, then, is whether Thompson and Troupe, who have not appealed from the judgment, are to be deemed adverse parties so as to require them to be served with notice of the appeal. They certainly have no interests in the case which are adverse to, or in conflict with those of the appellant. The judgment is against them and the appellant, as well as the boat, for a specific sum of money. Its modification or reversal would affect them precisely as it would affect the appellant, indicating that it and their interests are identical, and not adverse. The party interested in sustaining the judgment

86 24 Or. 121, 127, 41 Am. St. Rep. 838, 32 Pac. 1040.

or decree is an adverse party to the appellant, and, as such, is entitled to notice of the appeal. Thompson and Troupe are not interested in sustaining, but in defeating, the judgment, and are not parties whose interests are in conflict with, or adverse to the party appealing." The same question was considered and decided in Green v. Berge,[87] where the court declined to sustain an objection to jurisdiction, under the circumstances, saying: "Is appellant's codefendant an adverse party? The appeal cannot result in a modification of the judgment against him. If the appeal be successful, the only possible result would be either that a new trial would be awarded as to the appellant, or a joint judgment would be entered against both defendants in lieu of the present judgment against Berge. This would in no way affect the liability of Berge upon the judgment, though it might give him the advantage of a codefendant. This is not an adverse interest." In Jones v. Lamont,[88] though, the point before the court was the right of an attorney who had been attorney for the administrator to take an appeal for one of the distributers from a decree of distribution, the decision of that point turned exclusively upon the question, whether the administration had an interest in the

[87] 105 Cal. 52, 56, 38 Pac. 539, 45 Am. St. Rep. 25. See, also, Randall v. Hunter, 69 Cal. 81, 10 Pac. 130, where failure to serve codefendant in default, was held not fatal to appeal: Lillienthal v. Caravita, 15 Or. 341, 15 Pac. 280, where fraudulent mortgagee held not adverse party where mortgage set aside and appeal was only as to remaining part of judgment establishing priority of lien holders: Seattle etc. Co. v. Pitner, 17 Wash. 367, 49 Pac. 505, where garnishee held not adverse party. Parties held not adverse, within above principle, so as to require that they be served as follows: one of several defendants who have filed a motion for new trial based upon joint statement upon appeal by another from a motion denying the motion: Bliss v. Grayson, 25 Nev. 329, 59 Pac. 888; comaker of note upon appeal by the other from judgment against both: Oleson v. Wilson, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372; receiver in insolvency proceedings: Matter of Chope, 112 Cal. 630, 44 Pac. 1066; defendants to a foreclosure suit, whose interests had attached subsequent to that of plaintiff, and who appeared only to disclaim title: Watson v. Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

[88] 118 Cal. 499, 503, 62 Am. St. Rep. 251, 50 Pac. 766.

STANFORD LAW LIBRARY

appellate proceeding, such as to entitle him to be served with notice of the appeal, and the court held that he had no such interest, upon authorities to the effect that he may not appeal from an order of distribution.[89]

An appellant is certainly not required to serve persons who may have possible interests not shown by the record, or who have not in some way been made, or made themselves parties.[90] And it may be stated as a general rule that the appellate court will not go outside the record to consider any interest claimed to be adverse. Whether a party to an action is "adverse" to appellant must be determined by their relative positions on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other, or to the subject matter of the action. If his position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from the judgment thereon.[91]

A notice of appeal from certain portions of a judgment, or an order, need only be served on those parties whose rights would be affected by a modification of the portions of the decree appealed from.[92]

89 See cases cited ante, §§ 535, 537, 538.

90 See Mohr v. Byrne, 132 Cal. 250, 64 Pac. 257; Estate of Scott, 124 Cal. 671, 57 Pac. 654. Falling within same principle are: Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512; Commercial Nat. Bank v. United States Savings etc. Co., 13 Utah, 189, 44 Pac. 1043; Medynski v. Theiss, 36 Or. 397, 59 Pac. 871.

91 Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

92 Miller v. Thomas, 71 Cal. 406, 12 Pac. 432. See, also, Miller v. Rea, 71 Cal. 405, 12 Pac. 431; Roylance v. San Luis Hotel Co., 74 Cal. 273, 20 Pac. 573. In the second case, the court said: "A motion was made to dismiss this appeal on the ground that the appellant had not served the notice of appeal on all the adverse parties or their attorneys. The appeal is from specific parts of the interlocutory decree only, viz., the parts relating to certain portions of an undivided one-sixteenth of the rancho Las Animas; the decree as to the remainder of the rancho is not involved in the appeal. The notice was served on the parties (or their attorneys) interested adversely to the appellant, in so much of the undivided one-sixteenth as is involved in the appeal. The motion is denied." In

§ 538. Further as to meaning of "adverse party"—Failure to appear—Fictitious parties.

In several of the cases already noticed one or more parties whom it was held necessary to serve with the notice of appeal had defaulted in the lower court. So it is seen that the mere fact that a party fails to appear and defend does not necessarily signify that he is indifferent as to what judgment may be finally entered in the action or proceeding. Especially is this true in cases where there are several parties to an action and a judgment against some will be a release of others entirely or pro tanto, casting the entire burden of satisfying the judgment upon the party who has defaulted, as in cases involving liens. So where the party in default, though evincing indifference prior to judgment, yet has had his rights in and to the subject of the litigation settled by it, the proposition of unsettling them on appeal is new and different; for instance, in partition suits. An additional illustration was where the action was to foreclose a mortgage, a husband and wife being defendants, and the wife having defaulted. The court, after a decision of the facts said: "But it was argued that because

the last of these cases the court said: "As it appears, to us, the notice of appeal in this action was intended to embrace only that part of the judgment of the court below which affected the plaintiffs in adjudging that 'they take nothing against the defendant the San Luis Hotel Company, and that their complaint, in so far as it seeks to foreclose a lien, be and the same is hereby dismissed out of this court,' and 'that the defendant the San Luis Hotel Company do have and recover from the plaintiff its costs and disbursements now taxed at twenty dollars and twenty-five cents.'' It was not intended to include in the notice any appeal from that portion of the judgment where the plaintiff recovered a personal judgment against Armstrong Brothers for a sum of money. Taking all the terms of the notice of appeal together, it seems to us that the words 'said judgment,' where they occur in the last clause of the notice, refer, not to the whole judgment as rendered by the court, but to that part of it which is set out in the language of the notice preceding the last clause thereof, which language, fairly interpreted, includes only that part of the judgment which affects the hotel company and the plaintiff, but does not include that portion which affects the rights of Armstrong Brothers. Therefore the appeal as taken should be entertained, notwithstanding that the counsel for Armstrong Brothers were not served with notice of the appeal.''

STANFORD LAW LIBRARY

she made default in the court below, she ceased to be an adverse party, and was not entitled to notice of the appeal. By her default, she admitted nothing more than that the allegations of the complaint are true, and not that she is personally liable for the whole debt, or that it should be made a lien upon her property alone." [93]

Notice need not be served upon parties who have defaulted or who have not been summoned in the lower court if by the record it appears that they cannot be prejudicially affected by a reversal or modification of the judgment or order.[94]

§ 539. Filing the notice.

The question of how a notice of appeal should be filed, or what constitutes such filing, is governed by the principles governing the filing of papers generally.[95] Such notice has no peculiar or distinctive quality in this respect. So indispensable, however, is the filing of the notice that it cannot be waived,

93 Moody v. Miller, 24 Or. 179, 181, 33 Pac. 402. See, also, Jackson County v. Bloomer, 28 Or. 110, 41 Pac. 930.

94 See Snohomish County v. Ruff, 15 Wash. 637, 47 Pac. 35, 441; Home Sav. & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Peck v. Agnew, 126 Cal. 607, 59 Pac. 125 (not served); Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176 (not served); United States Inv. Corp. v. Portland Hospital, 40 Or. 523, 64 Pac. 644. 67 Pac. 194; Essency v. Essency, 10 Wash. 375, 38 Pac. 1130 (not appearing); Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991 (defendant fictitiously named and not appearing); Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732 (defendant not appearing and not served).

95 It was held that the filing of a notice of appeal was at least the actual delivery thereof to the clerk; and that a mere deposit of the notice in the postoffice, directed to the clerk, did not constitute delivery thereof: Brooks v. Nickel Syndicate, 24 Nev. 264, 52 Pac. 575. Under sections 940 and 941 of the Code of Civil Procedure, the notice of appeal from an order changing the place of trial to another county, and the undertaking on appeal, must each be filed in the office of the clerk of the superior court of the county which made the order; if filed with the clerk of the county to which the transfer was made, the appeal is ineffectual, and will be dismissed: Mansfield v. O'Keefe, 133 Cal. 362, 65 Pac. 825.

not even by stipulation; therefore it is jurisdictional.[96] Nor has the court below any power to relieve a party of the results of a failure to file the notice within the time limited by the statute.[97] But there is a distinction between a stipulation attempting to waive the filing of the notice and one admitting that it has been filed.[98]

§ 540. When notice may be served.

There is at least plausible argument in favor of the proposition that there is no limit of time after the filing of the notice for serving it, provided, of course, that it be served before the expiration of the time within which an appeal may be taken.[99] An analogous principle is found in cases where statements on motion for new trial, required by the statute to be settled, allowed, engrossed and then filed, were filed before settlement and engrossment, it being held that the fact that they were already on file at the time they were required to be filed, dispensed with a further filing. It is obvious that, for instance, the judgment being entered one day, and the notice of appeal is filed the next, and then served on the last day on which an appeal can be taken, can work no injury to the adverse party. The filing of a notice of appeal does not alone constitute the taking of an appeal nor can it be claimed in such a case as above supposed that the case has been thus unnecessarily, or prejudicially hung up on appeal during the intervening period. Nor

96 Mansfield v. O'Keefe, 133 Cal. 362, 65 Pac. 825; Taylor v. Lapham, 41 Or. 479, 69 Pac. 439; State v. Butler, 19 Wash. 110, 52 Pac. 521; Stierlen v. Stierlen, 8 N. Dak. 297, 78 N. W. 990.

97 Taylor v. Lapham, 41 Or. 479, 69 Pac. 439. In this case the court said: "The statute makes the service and filing of the notice of appeal indispensable to give this court jurisdiction (Oliver v. Harvey, 5 Or. 360), and an appeal is not taken unless the notice is both served and filed. The filing, therefore, is as important as the service, and both are required to be done within six months. If the court can extend the time in which to file the notice, it can thus, in effect, extend the time in which an appeal may be taken, and, under all the decisions, it has no power to make such an order."

98 Bonds v. Hickman, 29 Cal. 463; Carey v. Brown, 58 Cal. 180.

99 Of course, after it is served it must be filed before the expiration of the time for filing the undertaking. But that is a different proposition.

STANFORD LAW LIBRARY

does placing and keeping the notice on file affect the finality of the judgment or tend to embarrass the adverse party in any way. The record in such case discloses without further inquiry that no appeal has been taken; it shows the absence of any proof of service and the absence of an undertaking. Prior to service of the notice on file is a blank piece of paper on file. But the moment it is served, it becomes an actual, rather than a potential, notice of appeal. To then withdraw and refile it would appear to be an idle ceremony.[100] But in view of the construction given to code provisions on the subject cited in the next section, and a previous section, it should, in such case, be refiled on the date of service if it be a case in which no undertaking is required, and before the filing of the undertaking in other cases.

§ 541. How notice served.

The service of the notice is governed by the provisions of law prescribing how all notices and other papers shall be served.[101] That service, as well as filing, within the time lim-

100 See Cal. Code Civ. Proc., § 940.

101 Cal. Code Civ. Proc., §§ 1010-1013. See Arthur v. Maunce, 4 Idaho, 487, 42 Pac. 509; Howard v. Shaw, 10 Wash. 151, 38 Pac. 746, holding that service upon surviving member of law firm, attorneys of record for party, after decease of the other. When service by mail sufficient, see De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795. Dates from deposit in mail: Johnson County Sav. Bank v. Klaffki Co., 26 Mont. 384, 68 Pac. 410. How served on attorney other than personally. See Fairfield v. Binnian, 13 Wash. 1, 42 Pac. 632; Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910; Dall v. Smith, 32 Cal. 475; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Hauser v. Nolting, 11 S. Dak. 483, 78 N. W. 955. Due service of a notice of an appeal on an attorney is sufficient service on all the parties for whom he appeared, if the notice was directed to all: Hendricks v. Edmiston, 15 Wash. 687, 47 Pac. 29. Where an attorney appears both for himself and as attorney for his wife, notice directed to both and served upon him is good: Howard v. Shaw, 10 Wash. 151, 38 Pac. 746. As to service of notice on election day, see State v. Brewing Co., 2 S. Dak. 363, 50 N. W. 629; Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341, a case of defective proof of service of a notice of appeal, but being of equal force and applicability in case of service of transcripts is important because of the fullness and pithiness of the opinion which is in part as follows: 'The only evi-

ited for taking the appeal and within the statutory time before filing the undertaking, is essential has been often decided.[102]

dence of service of the notice of appeal upon them, or either of them is contained in an affidavit of Isadore Golden, a clerk of Kowalsky, who states therein that on the second day of December, 1898, he prepared typewritten notices of the appeal, and 'left a copy at the office of Wilson & Wilson, attorneys for Kate C. Byrne et al.' It appears from the record that Wilson & Wilson were the attorneys for the respondents Kate C. Byrne and John E. Byrne. It is not shown that the notice of appeal was ever received by these attorneys. Section 940 of the Code of Civil Procedure requires the notice of appeal to be served 'on the adverse party or his attorney'; and section 1015 declares that: 'In all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party.' Section 1011 provides that if the service is personal, it is to be made by a delivery of the notice or other paper to the party or attorney on whom the service is required to be made. The section, moreover, provides for service in certain instances where such delivery cannot be made, as follows: 'If upon an attorney, it may be made during his absence from his office by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of 8 in the morning and 6 in the afternoon, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving them at the attorney's residence with some person of suitable age and discretion.' The affidavit of service must show that all the requirements of law to effect service have been complied with, and also the existence of the conditions authorizing service in the mode adopted. In the present case the affidavit fails to show whether the attorneys for the respondent were absent from their office, or whether any clerk was present, or anybody in charge of the office, or at what time in the day the copy was left. Neither does it show whether the office was open or closed; and the statement that the affiant left it at the office is inconsistent with the fact that the office was closed, and that it was left outside of the door. If the office was open, the affidavit does not state that the notice was left 'in a conspicuous place in the office,' and, as was said in Doll v. Smith, 32 Cal. 476: 'For aught that appears to the contrary, it may have been put in the stove or some other place where it was not likely to be found.' In that case the statement in the affidavit that the affiant 'served the within notice on the plaintiff by leaving a copy of the same at the office of J. G. Doll, plaintiff's attorney, in the town of Red Bluff on the twenty-third day of July, 1866,' was held to be insufficient proof of service, and

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Service should be upon the attorney of record unless the case fall within an exception mentioned in the statute.[103] And under the code provision governing partition suits, a notice of appeal in an action for partition may be served upon the attorney of record of another party, notwithstanding the death of such party prior to the appeal; and such notice may be served upon the original attorney of record, where there has been no substitution, notwithstanding another attorney may have appeared and signed an amended pleading for such party.[104] But generally the death of a party works a revocation of the attorney's authority and such service is insufficient.[105]

Under the California code, a notice of appeal may be served before it is filed; but unless the undertaking be filed within five days after service, the service is ineffective.[106] In count-

the appeal was dismissed. In Gallardo v. Atlantic etc. Tel. Co., 49 Cal. 510, the statement of the affiant that he 'left a true copy of the notice at the office of Crane & Bond, the attorneys for the defendant,' was held not to show service of a notice of the settlement of a bill of exceptions: See, also, Dalzel v. Superior Court, 67 Cal. 453, 7 Pac. 910. Under these authorities it must be held that there is no proof of the service of the notice of appeal."

102 See Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

103 Valley etc. Land Co. v. Schone, 2 S. Dak. 344, 50 N. W. 356; Pierre Bank v. Ellis, 9 S. Dak. 251, 68 N. W. 545; Hoffman v. Bank, 4 N. Dak. 473, 61 N. W. 1031; Thompson v. Alford, 128 Cal. 227, 60 Pac. 686; Nathan v. Sutphen, 68 Cal. 267, 9 Pac. 110; Wheeler v. Cragin, 25 Or. 602, 38 Pac. 308; Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977; Marshall v. Harney Peak Co., 1 S. Dak. 350, 47 N. W. 290. Counsel representing both successful and unsuccessful defendants held incompetent to acknowledge for successful defendant notice of appeal by unsuccessful ones: Hayes v. Union Mer. Co. (Mont.), 70 Pac. 975. Service upon the party, after service upon the attorney, held to be a nullity in Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

104 Lacoste v. Eastland, 117 Cal. 673, 49 Pac. 1046; Cal. Code Civ. Proc., § 763.

105 See Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 93; Sheldon v. Dalton, 57 Cal. 19; Holt v. Idleman, 34 Or. 114, 54 Pac. 279.

106 Cal. Code Civ. Proc., § 940. See Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998.

ing the five days, an additional day for filing the notice and undertaking is allowed where the fifth is a legal holiday.[107]

In Washington the statute provides that a party desiring to appeal may give notice in open court when the judgment is rendered.[108]

Where the statute prescribes a mode of service as a substitute for service upon the attorney, the statutory mode of substituted service must be strictly pursued. Thus where a statute provided that where neither a party nor his attorney could be found within the county, "of which fact a return by the sheriff that they cannot be so found shall be proof," and made such return the sole evidence upon which a substituted service could be based, it was held that an affidavit by a private party would not authorize such service.[109]

A statute of Montana provides generally that, where a party has an attorney in an action, service of papers shall be upon the attorney. A section of the code provides that the notice of appeal may be served "on the adverse party or his attorney." Another provides that when a general and a particular provision of a statute are inconsistent, the particular provision shall prevail. It was held that service of notice of appeal on the appellee was sufficient.[110] On an appeal by the direction of a corporation, in an action against them by a stockholder from a judgment rendered against them, a notice of appeal served on the attorney for the plaintiff necessarily brings the corporation defendant before the appellate court.[111] In California service on the clerk for a party who appears in person and without an attorney and who resides out of the state is sufficient.[112]

107 Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998.

108 Act March 8, 1893, § 4. Construed in Northen Counties Inv. Co. v. Hender, 12 Wash. 559, 41 Pac. 913; Hays v. Dennis, 11 Wash. 360, 39 Pac. 658.

109 Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654.

110 Mantle v. Largey, 15 Mont. 116, 41 Pac. 1077; Mont. Code Civ. Proc., §§ 442, 492, 631.

111 Beach v. Cooper, 72 Cal. 99, 13 Pac. 161.

112 Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013; Cal. Code Civ. Proc., § 1015.

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It was held in Reed v. Allison and Murdock v. Clarke,[113] that where the respective attorneys for the appellant and the respondent resided and had their offices at different places, between which there was regular communication by mail, a service by mail of notice of appeal was insufficient if the notice was deposited in the postoffice at a place other than that at which the attorney for appellant resided or has his office. But these cases were overruled in Luck v. Luck,[114] where it was held that said decisions were based upon an erroneous construction of the provisions of the code, and that the notice need not be deposited in the postoffice at any regular place, the only essentials being residences or offices in different places, and a regular mail communication between the place of mailing and the place of destination.

Care should be taken that proof of service be placed on file and appear in the transcript on appeal, whether it be a written admission of service or an affidavit. While the supreme court of California is less strict than formerly in the enforcement of this requirement, it is usually more convenient to observe it than to neglect it, and then be compelled to supply the defect after the transcript has been perfected and transmitted.[115]

§ 542. Same subject—When service upon party individually sufficient.

If the party had no attorney in the trial court he must be presumed to have conducted the proceedings in propria personam, whether the record shows his presence and participation or not. At any rate, if he had no attorney, service on him is sufficient. On the other hand, it is settled that the attorney of record must be served if there be one; and where there is one, service upon the party himself is ineffectual. This conclusion was reached upon comparison and construction of the respective statutes in Abrams v. Stokes.[116]

It has been uniformly construed in connection with section 1015 of the same code, or corresponding identical statutes, by

113 61 Cal. 461, and 73 Cal. 25, 14 Pac. 385, respectively.

114 83 Cal. 574, 23 Pac. 1035; Cal. Code Civ. Proc., §§ 1012, 1013.

115 See post, §§ 638, 644.

116 39 Cal. 150. Approved, First Nat. Bank v. Bernard, 4 Colo. 72; McKittrick v. Pardee, 8 S. Dak. 41, 65 N. W. 23.

which it is provided among other things that "in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt." The California code cannot, then, be construed to mean that the appellant has the option of service either upon the party or his attorney, but rather that he may serve the notice on the party personally only when he has no attorney of record.[117]

§ 543. Rule that each prescribed step in process of appealing is jurisdictional.

From all that precedes, it is seen that the question of parties to an appeal is to be determined upon analogous principles to those which govern in bringing actions in the courts of original jurisdiction. This results from the settled doctrine that an appeal is an independent proceeding—that is, practically the commencement of a new litigation having for its subject matter the judgment decree or order complained of.

Statutes providing the remedy of appeal for the correction of error as a substitute for writ of error have by no means abrogated the common-law rule, requiring all persons whose interests would be affected by the reversal or modification of the decree to be made parties to the appeal and to be brought into court. Such statutes have only changed the mode of bringing them into court. And upon the same view of the matter it might appear upon first impression to result that in some cases the defect of parties might be waived while in others, as in trial courts the defect is vital, that is to say, that it goes to the jurisdiction of the appellate court. But when it is considered that appeal is purely a statutory proceeding, sometimes called remedy—and that the rule as to parties to be served is also statutory, it is clear that the distinction, recognized in trial courts between necessary and proper parties has no place there.

It may be noted that in some of the cases already noticed the court, of its own motion, pointed out the defects of parties re-

[117] A different construction given the Montana Code provisions on subject. See last preceding section.

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spondent and refused on that account to pass upon the points presented; in others dismissed the appeal on objections raised by motion and in others, passed upon the points, notwithstanding such defects of parties suggested in the opinions, no motions to dismiss having been made. No inference of a relaxation of the rule can be drawn from the mere fact that the court has passed upon the merits of the appeal in such cases, since no case can be found in which an appellate court has avowedly reversed or materially modified a judgment, order or decree in the face of a failure to serve a party "adverse" within the meaning of the statute. Where the court, in such cases, has passed upon the points raised on the appeal, it has almost invariably resulted in a decisioon on them adverse to the appellant the jurisdictional point being reserved and brought forward as a reinforcement, or as a determinative matter regardless of any merit found in the points made by the appellant. It may, therefore, be stated as well settled, that unless an appeal be taken within the time limited by statute, the appellate court acquires no jurisdiction, and will not consider the same; and an appeal is not taken in time if any step for taking it, prescribed by statute to be taken within a specified period be omitted. So strictly is the rule[118] observed that a failure to comply with the provisions of the statute cannot be cured by stipulation of counsel for both parties.[119] But counsel may in a stipulation ad-

118 Most of the cases already cited in this chapter support the above proposition. See, also, Hibbard v. De Lanty, 20 Wash. 539, 56 Pac. 34, Estate of Calkins, 112 Cal. 296, 44 Pac. 577; Mahoney v. Board of Commissioners (Idaho), 69 Pac. 108; Valley etc. Land Co. v. Schone, 2 S. Dak. 344, 50 N. W. 356; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 67, 68, 62 Pac. 264; Marx v. Lewis, 24 Nev. 306, 53 Pac. 600; Hauser Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Estate of Fisher, 75 Cal. 523, 17 Pac. 640.

119 Penny v. Nez Perces County (Idaho), 43 Pac. 570. In Matter of Castle Dome Min. Co., 79 Cal. 249, 21 Pac. 746, the court said: "And we cannot hold that respondents are precluded by rule 13 of this court from urging this objection now because they failed to make it prior to the original hearing of the case. Rule 13 cannot be held to apply to an objection which goes directly to our jurisdiction to hear an appeal. The ground upon which a respondent is allowed to object to the hearing of an appeal, because some other party adverse to the appellant has not been served with notice of appeal,

mit the existence of a jurisdictional fact, or the performance of

is not that his rights are affected, but merely that the court is bound at all times to keep within its proper jurisdiction, and must give heed to such objections, no matter how they are brought to its attention." In Gardner v. California etc. Co., 129 Cal. 528, 62 Pac. 110, the undertaking was irregular in form, and the court held merely that the irregularity was waived by a stipulation extending time to file briefs. In Wittram v. Cromelin, 72 Cal. 90, 13 Pac. 160, a stipulation extending time for justification of sureties was held not a waiver of the objection that the undertaking was not filed in legal time. In San Bernardino v. Riverside, 135 Cal. 618, 621, 67 Pac. 1047, the court said: "The respondent did not waive its right to move for a dismissal of the appeals by stipulating to the correctness of the bill of exceptions, or of the transcript on appeal. It has taken no affirmative step in reference to the appeals by which their validity was recognized, and it gave notice of its intention to move for their dismissal with reasonable promptness." The opinion in Perkins v. Cooper, 87 Cal. 244, 25 Pac. 411, has such special bearing upon the effect of stipulations, as to justify a lengthy quotation as follows: "Attached to the transcript which has been filed herein, there is a stipulation, entitled in this court, agreeing to the correctness of the transcript, and stating that a good and sufficient undertaking on appeal has been duly executed and filed. It is both proved and conceded that this statement is untrue, and the attorney for respondent says that he signed it without actual knowledge of the fact, and relying upon the statement of the counsel on the other side that such an undertaking had been filed, coupled with the fact that he knew the counsel to be perfectly familiar with the requirements of the statute and a careful practitioner, and also that the parties were amply able to file the undertaking. There is possibly some doubt as to just what was said on the subject when that stipulation was signed; but there is no doubt about the fact that the statement contained in it on the subject of undertaking was untrue. From that fact, it follows: 1. That there was then no case in this court in which counsel could bind a client by such a stipulation; 2. That if the language of the stipulation could possibly be construed as a waiver of an undertaking (which we very much doubt), it could only operate as a waiver as of and from the date of the stipulation, March 28, 1889, and there was at that date no appeal pending in which to waive an undertaking, and no cause pending in this court in which to make the stipulation. In re Skerrett, 80 Cal. 63, 22 Pac. 85, it was held that, in order to entitle certain parties to appeal without filing an undertaking under section 946 of the Code of Civil Procedure, the order dispensing with the undertaking must be made within the time prescribed by law for filing the undertaking. So if the filing of an undertaking is to be waived; it must be done within

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an essential act, and be bound thereby in the appellate court.[120] Nor have courts under general authority given by statutes to extend time, power to extend it for performing any steps in the process of perfecting an appeal.[121] The rule is strictly adhered to by the Washington court; and it was held that a party not served could not aid the defect of jurisdiction by afterward attempting to join in the appeal.[122] But the service of the notice of appeal is so far a provision for the personal benefit

the time for filing; otherwise, the appeal is lost, and the party has acquired a right of which he cannot be deprived by that attempt to appeal." So in Duncan v. Times Miner Pub. Co., 109 Cal. 606, 42 Pac. 147, the court said: "The transcript on appeal in this case contains a certificate to the effect that 'an undertaking on appeal in due form has been properly filed,' as required by section 953 of the Code of Civil Procedure. It is contended that this certificate is conclusive; that in case the certificate is untrue the respondent has his remedy against the clerk, who is liable on his official bond. This proposition has been frequently suggested here on the consideration of similar motions, and, although it has not been discussed in any reported decision, the court has constantly and frequently permitted parties to go behind this certificate. It could not have been intended that the judgment of the clerk should be final in this matter." The same reasoning would apply when there has been a failure to file or to serve the notice of appeal within the time required by positive statutory laws, or within legal time determined by the court by analogy to the statute, in the absence of an express statutory requirement. In Bonds v. Hickman, 29 Cal. 463, the court in reference to filing the notice of appeal, said: "A waiver of the filing by stipulation of the parties is not the equivalent of the filing of the notice; for consent, though it may waive error, cannot confer jurisdiction." The cases make a distinction between the admission of the fact of filing in a stipulation to the correctness of a transcript, and one attempting to waive the filing of a notice or an undertaking. The admission is held binding, but the most formal and positive agreement to waive the jurisdictional fact is of no force or effect. The court has never been inclined to attach any meaning to stipulations upon motions to dismiss other than that which is clearly expressed, or necessarily implied.

120 See ante, § 533; post, § 660.

121 Brown v. Green, 65 Cal. 221, 3 Pac. 811; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; McDonald v. Lee, 132 Cal. 252, 64 Pac. 250.

122 Winters v. Gray's Harbor Boom Co., 19 Wash. 346, 53 Pac. 368, construing Laws 1893, p. 121, § 5, c. 61.

of a party that it may be waived.[123] And the code expressly recognizes the right of parties to waive an undertaking.[124] But a waiver of the undertaking, differing from the service, may not be inferred from circumstances or conduct of the parties. It can only be by stipulation. The notice of appeal stands upon a different basis. While as just stated its service may be waived, and its filing admitted, if not shown in the record, the notice itself cannot be dispensed with. The reason is technical, but the rule is absolute. Jurisdiction cannot be based upon a record from which the notice is omitted. It is designated as one of the papers to be furnished the supreme court.[125]

[123] See Holden v. Haserodt, 2 S. Dak. 220, 59 N. W. 97, holding notice waived by appearance; Home Sav. etc. Assn. v. Burton, 20 Wash. 688, 56 Pac. 940, where defect in notice waived by accepting service; Woods v. Walsh, 7 N. Dak. 376, 75 N. W. 767, waiver of objection as to authority of attorney signing notice. Objections not waived by serving and filing amendments to proposed statement on appeal: Brooks v. New Nickel Syndicate, 24 Nev. 264, 52 Pac. 575.

[124] Cal. Code Civ. Proc., § 953.

[125] Cal. Code Civ. Proc., §§ 950, 951, 952.

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CHAPTER 30.

UNDERTAKINGS ON APPEAL.

§ 544. Purpose and meaning of—Relation to stay bond.
§ 545. An undertaking must be filed unless waived.
§ 546. Time for filing—Relation to service and filing notice—Extension of time.
§ 547. Deposit in lieu of undertaking.
§ 548. Undertaking required for each appeal—Exceptions.
§ 549. Form and essential parts.
§ 550. As to what constitutes sufficient execution.
§ 551. Undertaking by surety companies.
§ 552. Dispensing with undertaking by stipulation—Waiver—Estoppel.
§ 553. Statutes dispensing with undertaking.
§ 554. Relief in appellate court from defects and omissions.

§ 544. Purpose and meaning of—Relation to stay bond.

Under the California Code of Civil Procedure there are two kinds of undertakings that may be used, in an appellate proceeding; first, formal undertakings in the sum of three hundred dollars to secure the payment of costs and damages required to be filed within five days after service of the notice;[1] and, secondly, undertakings to stay the enforcement of judgments, pending appeals.[2]

There is a further provision affecting undertakings by executors, administrators and guardians[3] to be construed in connection with section 946. Only the first kind—those mentioned in

1 Cal. Code Civ. Proc., §§ 940, 941. Where undertaking on appeal properly served and filed as well as proper notice of appeal, jurisdiction vests in appellate court, whether stay bond be executed and filed or not, though judgment direct payment of many: Sutton v. Apex etc. Min. Co., 12 S. Lak. 576, 82 N. W. 188. See post, § 546.

2 Cal. Code Civ. Proc., §§ 942-949.

3 Cal. Code Civ. Proc., § 965.

sections 940 and 941—have any direct connection with the appeal. They will be first considered. The provision incorporated as section 940 of the code was amended in 1874, since which there has been no change. All that part of it, relating to the undertaking, reads as follows: "But the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."

§ 545. An undertaking must be filed unless waived.

Some of the decisions of the California supreme court rendered during a period in which the statutes fixed no limitation of time in which an undertaking might be filed on an appeal from the county court, are inapplicable at present. In all appeals to the supreme court now allowed by law, an undertaking is indispensable, except in the cases covered by section 1038 of the Code of Civil Procedure. It must be filed within the time limited by the code, unless a deposit be made in lieu thereof, or the same be waived.[4] And the fact that one was filed in due

[4] Cal. Code Civ. Proc., § 940; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; ellegarde v. San Francisco Bridge Co., 80 Cal. 61, 22 Pac. 57; Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594; Washoe Copper Co. v. Hickey, 23 Mont. 319, 58 Pac. 866; Hines v. Carl, 22 Mont. 501, 57 Pac. 88; Marx v. Lewis, 24 Nev. 306, 53 Pac. 600; Spofford v. White River etc. Co., 24 Nev. 184, 51 Pac. 115; Coburn v. Board, 10 S. Dak. 552, 74 N. W. 1026, holding that an undertaking on an appeal which has been dismissed because prematurely taken is not available on a subsequent appeal from the same judgment. To same effect Hibernia Sav. Soc. v. Freese, 127 Cal. 70, 59 Pac. 769; Hoagland v. Hoagland, 18 Utah, 304, 54 Pac. 978, Bokien v. State, 14 Wash. 401, 44 Pac. 883, holding that Revised Statutes of 1898, sections 1016-1020, providing how a poor person may prosecute or defend an action without advancing officer's fees do not modify or repeal Revised Statutes of 1898, section 3305, requiring the filing of an undertaking on appeal for respondent's benefit; Galloway v. Tyassen, 22 Wash. 103, 60 Pac. 129; Grunewald v. West Coast etc. Co., 10 Wash. 691, 38 Pac. 1011; Smithson v. Woodin, 13 Wash. 709, 43 Pac. 638; Hibbard etc. Co. v. DeLanty, 20 Wash. 539, 56 Pac. 34; Stans v. Baity, 9 Wash. 115, 37 Pac. 316, holding that joining in appeal already taken, under section 5, page 121, of the Session Laws of 1893, does not dispense with undertaking.

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form and time, or waived, must affirmatively appear from the clerk's certificate to the transcript or by written admission or waiver of counsel.[5] In Wakeman v. Coleman[6] it was held sufficiently shown that an undertaking was given that it was set out in the transcript, and its correctness certified to by the clerk. But in San Francisco etc. R. R. Co. v. Anderson,[7] it was held that this was no longer the law, and that under the provisions of the Code of Civil Procedure the undertaking on appeal, not being one of the papers required to be set out in the transcript, should not be embodied therein, and that it was insufficient without either a stipulation of counsel or a certificate by the clerk of the due filing of a proper undertaking. An amendment of the clerk's certificate will be permitted, however, when defective in form in failing to mention the due filing of a proper undertaking.[8]

In determining what constitutes a filing, the same rule applies as in the case of other papers required to be filed. At least a presentation of the undertaking for filing at the clerk's office within proper time is essential. If that be done, neglect of the clerk in indorsing it as filed will not be permitted to affect its validity as an undertaking.[9] As a rule, any legal fees may be demanded and if not paid, the clerk is not bound to receive

5 Bryan v. Berry, 8 Cal. 130, 135. See, also, Franklin v. Reiner, 8 Cal. 340; Hastings v. Halleck, 10 Cal. 31; Wakeman v. Coleman, 28 Cal. 59; Pardee v. Murray, 4 Mont. 371, 1 Pac. 737; People v. Alameda T. Co., 30 Cal. 184; Gordon v. Wansey, 19 Cal. 82, and Shissler v. Crooks, 1 Idaho, 370, where appeals dismissed for failure to file undertakings within legal time.

6 28 Cal. 58.

7 77 Cal. 297, 299, 19 Pac. 517, affirmed in Swasey v. Adair, 83 Cal. 137, 23 Pac. 284, but permitting amendment of clerk's certificate defective in form; State v. Willis, 19 Mont. 447, 48 Pac. 773, holding clerk's certificate defective as to undertaking.

8 See post, §§ 644, 665.

9 Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223, holding, also, that the delivery of the undertaking to a deputy clerk, at a place other than the clerk's office, after office hours, on the last day for filing, which he then marked as filed as of that day, but which did not reach the clerk's office, and was not entered as filed until the following day, was not sufficiently filed to sustain the appeal.

the paper. But if he does receive and gives time for payment of the fees, the filing is good.[10]

§ 546. Time for filing—Relation to service and filing notice—Extension of time.

The provision of the California code already noted with reference to the time for filing the undertaking on appeal often designated as "the three hundred dollar bond" is so clear as to leave but a light task of construction to courts and counsel. The question arose in Holcomb v. Sawyer,[11] whether the undertaking must be filed within the time limited by the statute for taking an appeal the notice having been served and filed within the time. It was clear that neither the notice nor undertaking on the appeal from the judgment was filed in time and that appeal was summarily dismissed without comment. The notice of appeal from the order was served and filed on the sixtieth day after the order was entered, but the undertaking was not filed until the sixty-fourth day thereafter. As reported, the court held the undertaking not filed in legal time; but a rehearing was granted which was not reported and on the rehearing a different conclusion was reached. The original decision was reported by mistake, instead of the decision on rehearing. The conclusion on rehearing has been followed in subsequent cases.[12]

The statutory provision is that the appeal is ineffectual unless the undertaking be filed "within five days after service of the notice of appeal"; and since no appeal is pending upon which an undertaking can be filed, until the filing of the notice, it follows that the filing of the undertaking before filing the notice is a nullity.[13] The appeal is also ineffective and will be

[10] First Nat. Bank v. Hatfield (Wash.), 55 Pac. 932.

[11] 51 Cal. 417.

[12] See Lowell v. Lowell, 55 Cal. 316, 319, where the mistake occurring in the report of Halcomb v. Lawyer is referred to. Same conclusion reached in Peran v. Monroe, 1 Nev. 484; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133.

[13] Carpentier v. Williamson, 24 Cal. 609, 85 Am. Rep. 84; Laurendean v. Fugelli, 16 Wash. 367, 47 Pac. 759; Alvord v. McGauchy, 4 Colo. 97; Johnson v. Badger M. & M. Co., 12 Nev. 261; Wilson v. Bartlett (Idaho), 62 Pac. 415. In ordering the appeal dismissed, in

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dismissed if the undertaking be filed after the expiration of the five days limited by the code subsequent to service of the notice. The policy of the rule was thus stated in Hoyt v. Stark:[14] "It is necessary for the appealing party so to file within five days after the service of his notice of appeal. The adverse party thereafter has a limited time within which to except to the sufficiency of the undertaking, and to call upon the sureties to justify. The undertaking may be filed at any time within the five days, but may not be filed thereafter. Respondent's time for objection begins to run, not from the expiration of the five

the last case cited the court, per Hawley, C. J., said: "The record shows that the notice of appeal was filed April 16, 1877, but service thereof was not made until April 20, 1877. The undertaking on appeal was filed April 16, 1877. Section 331 of the Civil Practice Act provides as follows: 'The appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney': 1 Comp. Laws, 1392. It was decided by this court, in Lyon County v. Washoe County, that 'the filing of the notice of appeal must precede, or be contemporaneous with the service of the copy': 8 Nev. 177. But the appeal is not made until the notice is served. The appeal is taken by filing and serving the notice: Lambert v. Moore, 1 Nev. 344; Peran v. Monroe, 1 Nev. 484. To render the appeal so taken effectual a written undertaking, executed upon the part of appellant, must be filed, or a deposit made with the clerk, within five days after the notice of appeal is filed: 1 Comp. Laws, 1402. Section 348 gives the adverse party five days after the filing of the undertaking to except to the sufficiency of the sureties: 1 Comp. Laws, 1409. By comparing these sections of the Practice Act, it seems to us that the copy of the notice of appeal, as filed, must be served on the proper party before or at the time of filing the undertaking on appeal." It will be observed that the Nevada statute under which this decision was rendered differs somewhat from the existing California code provision. But the principle applies.

14 134 Cal. 178, 66 Pac. 223. See, also, Boyd v. Burrill, 60 Cal. 280; Biagi v. Howes, 63 Cal. 384; Brown v. Green, 65 Cal. 222, 3 Pac. 811, Stratton v. Graham, 68 Cal. 168, 8 Pac. 710; Duffy v. Greenebaum, 72 Cal. 159, 12 Pac. 74, 13 Pac. 323; Estate of Skerrett, 80 Cal. 63, 22 Pac. 85; Schurtz v. Romer, 81 Cal. 245, 22 Pac. 657; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795. The undertaking is not invalidated by being filed on the day that the notice is filed, after service of the notice: Shannon v. Consolidated etc. Min. Co., 24 Wash. 119, 64 Pac. 169.

days, but from the time of actual filing, which may be upon any day within the five days. No actual notice is required to be given to the respondent's attorney. It becomes his duty, therefore, to watch the office, and learn from an inspection of the proper records whether the undertaking has been filed. But if no such undertaking shall have been filed at the expiration of the five days, his duty in this regard is at an end." Upon the same reasoning it is held that if the undertaking be filed before service of the notice it warrants a dismissal of the appeal.[15]

There is a dictum in one case to the effect that it is not necessary that the two acts here considered, the performance of which shall not cover a longer period than five days, shall be performed within any particular period after filing the notice, provided service be made within the time limited for appealing.[16]

When the fifth day after serving the notice falls on a legal holiday, the undertaking may be filed upon the next day which is not a holiday.[17]

In California, the lower court or judge has power to extend the time allowed by statute in which to file the undertaking on appeal, and the fact that it was not filed until thirty days after the service of the notice of appeal is not ground for a motion to dismiss the appeal, where it appears that it was filed within the time properly allowed by order of the judge of the court.[18] When service of notice of appeal is made by mail it is complete at the time of the deposit of a copy in the postoffice, and the

[15] Little v. Jacks, 68 Cal. 343, 8 Pac. 856. 9 Pac. 264, 11 Pac. 128. See, also, Perkins v. Cooper, 87 Cal. 243, 25 Pac. 411. Under Montana Code of Civil Procedure, section 1724, an undertaking on appeal—unless waived— must be filed within five days of the service of the notice on the adverse party, and not within five days from the filing of the notice with the clerk, if the filing occurs after the date of such service: Johnson County Savings Bank v. Klaffki (Joe) Co., 26 Mont. 384, 68 Pac. 410.

[16] See ante, § 539.

[17] Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522.

[18] Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726.

[19] Brown v. Green, 65 Cal. 221, 3 Pac. 811; Johnson County Sav. Bank v. Klaffki (Joe) Co., 26 Mont. 384, 68 Pac. 410. In the first

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undertaking on appeal must be filed within five days after such deposit.[19]

§ 547. Deposit in lieu of undertaking.

The code[20] allows a deposit of three hundred dollars in lieu of the undertaking for the same amount. Similar statutes are generally found. When the appellant elects to make the deposit, "that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.[21]

The deposit is governed as to the time for making it by the same rule as that governing the filing of the undertaking; and if not made conformably thereto, the appeal may be dismissed.[22]

Where the appellant has elected to, and has made, the deposit, he will not be allowed, upon motion therefor in the supreme court, to withdraw the money so deposited and file and undertaking in lieu thereof.[23] And if, after the statutory time for filing an undertaking has expired, the appelant withdraws the

case the court in dismissing the appeal, said: "The service is complete at the time of the deposit of the 'similar notice' in the postoffice: Code Civ. Proc., § 1013. And to render an appeal effectual for any purpose, the undertaking on appeal must be filed within five days after service of the notice of appeal: Code Civ. Proc., § 940. . . . . But that portion of section 1013 which, in certain cases, extends the time one day for each twenty-five miles, has no application when the question is as to service of notice of appeal. After service of the notice of apepal by mail, which, as we have seen, is complete at the time of the deposit in the postoffice, there is no given number of days within which the adverse party may exercise a right, or do an act. The adverse party is the party on whom the service is made. There is no reason why the appellant should not file his undertaking on appeal within five days after he has deposited the notice of appeal in the postoffice. He knows when it was deposited. The right of the adverse party to except to the sureties begins to run from the filing of the undertaking, not from service of the notice on appeal: Code Civ. Proc., § 948. Under section 1013 the party serving a notice can never be a party adverse to himself."

20 Cal. Code Civ. Proc., § 940.

21 Cal. Code Civ. Proc., § 941.

22 Stratton v. Graham, 68 Cal. 168, 8 Pac. 710.

23 Wiebold v. Rauer, 95 Cal. 418, 30 Pac. 558.

deposit and files an undertaking in lieu thereof, it will be considered an abandonment, and the appeal may be dismissed.[24]

§ 548. Undertaking required for each appeal—Exception.

As a rule, if there be more than one appeal in the same transcript, there should be an undertaking filed for each appeal, each undertaking designating the appeal to which it applies. Accordingly, where the notice of appeal designated several orders from which it stated appeals were taken, only one of which was mentioned in an undertaking, the court refused to consider any error except such as might appear in the order designated in the undertaking.[25] In Chester v. Bakersfield etc. Assn.,[26] the case of appeals from the judgment and order on motion for new trial taken at the same time were held to be exceptions to the rule, thus practically overruling the prior case, and saying that this ruling was in consequence of "the long and well-settled practice which this court very properly declined to disturb." But no authority was cited; and the decision must be held to rest upon uniform acquiescence. The decision has been followed, however, in subsequent cases.

The exception to the rule established in Chester v. Bakersfield etc. Assn., in cases of appeals, both from the judgment and

24 Mullen v. Hunt, 67 Cal. 69, 7 Pac. 121. In this case, the withdrawal of the deposit and substitution of the undertaking was by an order of the lower court. The supreme court held the substituted bond constituted no security for costs. In this case the court in ordering the appeal dismissed, said: "But pending the appeal the money was withdrawn by the appellant and an undertaking filed in lieu thereof. This undertaking was filed after the time allowed by the statute for filing thereof, and, in our opinion, was filed without any law authorizing it. It is true it was done by an order of the court, but the court had no power to make an order which in effect extended the time for filing an undertaking on appeal beyond the thirty days fixed by the code. The undertaking thus filed may be left out of the case; and we find an attempted appeal without any security for judgment or costs. It was the voluntary act of the appellant in withdrawing the deposit and we think he thereby abandoned his appeal."

25 Horn v. Volcano Water Co., 18 Cal. 141. See, also, Estate of Kasson, 135 Cal. 1, 66 Pac. 871, holding that the rule not varied by fact that one or more of the orders included in such appeal are not appealable: Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815.

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order on motion for new trial, has not been extended, however, and the rule as to more than one appeal in the same case is otherwise, as above stated. A single undertaking filed on distinct appeals is void;[27] and the appellant cannot, in that case, proceed under section 954 of the Code of Civil Procedure to file a new undertaking, so as to preclude a dismissal of the appeal.[28] It is immaterial as affecting the enforcement of the rule, whether the separate appeals are taken by one and the same, or by separate notices.[29]

§ 549. Form and essential parts.

The undertaking must meet the requirements of the statute in matters of form and substance. While the courts will not

26 64 Cal. 42, 27 Pac. 1104. Followed in Sharon v. Sharon, 68 Cal. 333, 336, 339, 9 Pac. 187; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Bill v. Staacke, 137 Cal. 307, 70 Pac. 171; Watkins v. Morris, 14 Mont. 354, 36 Pac. 452; Frary v. Dwyer, 26 Mont. 414, 68 Pac. 1133; Robinson v. Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705. It seems that in South Dakota one appeal from judgment and from order on motion for new trial will not secure a review of the evidence: Minneapolis T. M. Co. v. Skau, 10 S. Dak. 636, 75 N. W. 199. The exception was permitted to prevail with reluctance in Ramsey v. Burns, 24 Mont. 234, 61 Pac. 129, and only because of the precedent established in Watkins v. Morris, supra. The exception was not allowed to prevail in case of an appeal from an order dismissing a motion for new trial and from the judgment in Biaggi v. Howes, 63 Cal. 384.

27 Home and Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16.

28 Home and Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16, where one of the orders was appealable and two others named in the notice were not. In the first case the court, in dismissing the appeal and denying leave to file a new undertaking, said: "In this case appellant took appeals from two orders, and filed one undertaking on appeal not distinctly referring to either appeal. The language used in the undertaking filed recites only one appeal without distinguishing which of the two appeals was referred to. The undertaking so filed is no undertaking at all. It is so ambiguous that it must be regarded as if none had been filed: People v. Center, 61 Cal. 191; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815."

29 Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813. The law upon all the phases of this subject was summarized and con-

be technically exacting in this respect, only requiring a substantial compliance, yet, where the undertaking, when brought to the attention of the court, appears to be so defective that it does not secure the payment of the costs and damages, the appeal will be dismissed. Thus, in People v. Center,[30] there were two groups of appeals. In the first, the undertaking recited the taking of three several appeals, and concluded with the promises of the sureties that, in consideration of the premises, "and of such appeal," they would pay all damages and

risely stated in this case as follows: "It is the settled rule of practice in this court that when an appeal is taken from two or more orders, or from a judgment and an order, whether the notice of such appeal is given by separate notices or in one instrument, the appellant must file the jurisdictional undertaking for three hundred dollars for the appeal from the judgment and from each of the orders appealed form, except in the single instance of an appeal from a judgment and an order denying a new trial. If a single undertaking for three hundred dollars is given, and refers to only one of the orders appealed from, or to the judgment alone, this court will have jurisdiction of only the matter so referred to in the undertaking, and the other appeals will be dismissed: Horn v. Volcano Water Co., 18 Cal. 141; Bornheimer v. Baldwin, 38 Cal. 671; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650. If the undertaking has no special reference to either matter appealed from, but is conditioned generally upon 'such appeal' (People v. Center, 61 Cal. 191; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815), or 'said appeals' (McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16), all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it was given. It is urged by the respondent that only one of the orders named in the notice of appeal is an appealable order, and that, as the appeal from that order is the only legal consideration for the undertaking, it must be referred to that appeal alone, and, consequently, that the foregoing rule is not applicable to the present case. We are of the opinion, however, that, although this suggestion is not without force, it is not sufficient to take the case out of the rule aforesaid."

30 61 Cal. 191. Hibernia Sav. & L. Soc. v. Freese, 127 Cal. 70, 59 Pac. 769. See, also, Schiller v. Small, 4 Idaho, 422, 40 Pac. 53, Baker v. Oregon R. & N. Co. (Idaho), 66 Pac. 806; Creek v. Bozeman Water Wks. Co., 22 Mont. 327, 56 Pac. 362; Murphy v. Northern Pac. Ry. Co., 22 Mont. 577, 57 Pac. 278; Washoe Copper Co. v. Hickey, 23 Mont. 319, 58 Pac. 866; Richter v. Eagle etc. Assn., 24 Mont. 346,

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costs which might be awarded, etc., "on said appeal, or on a dismissal thereof, not exceeding three hundred dollars," etc.; and it was held insufficient. Furthermore, an undertaking may be so ambiguous as to be void, in that it merely obligates the sureties in case both or all appeals taken at the same time shall be affirmed or dismissed instead of obligating them with respect to each appeal separately. Thus it was held that, where appellant appealed from a judgment, and from an order denying a new trial, an appeal bond, conditioned that it should be void if appellant paid all damages and costs awarded against it on such appeals or a dismissal thereof was insufficient, since the sureties thereby assumed no liability unless both appeals should be decided against appellant or should be dismissed.[31] An almost identical case was Corcoran v. Desmond,[32] where the court said: "The undertaking recites the taking of two appeals, and then, in consideration of the premises 'and of such appeal,' the sureties promise that the 'appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding three hundred dollars,' etc. This is a single undertaking of three hundred

61 Pac. 878. Compare Wallace v. McKinlay (Idaho), 53 Pac. 104, where it was held that on an appeal from a judgment and from an order sustaining a demurrer to the answer, an undertaking which provides "that said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof" only, without reference to either appeal was sufficient. Where an appeal is taken by more than one party, and an undertaking thereon is given by only one of the appellants, such undertaking is sufficient to perfect the appeal of the appellant by whom it is given; but where an appeal is taken by only one party, and the undertaking thereon purports on its face to be given on an appeal taken by several appellants, such undertaking is insufficient to support the appeal, and it will be dismissed: Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685. It was held that the undertaking, defective in the above respect was not aided by the fact that one or more of the orders included were not appealable: Estate of Kasson, 135 Cal. 1, 66 Pac. 871. To same effect, Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813.

31 Baker v. Butte City Water Co., 24 Mont. 31, 60 Pac. 488, rehearing denied, 24 Mont. 113, 60 Pac. 817. To same effect, Coleman v. Perry, 24 Mont. 237, 61 Pac. 129.

32 71 Cal. 100, 103, 11 Pac. 815.

dollars to cover the costs of two separate appeals, which is not admissible except in the single case of an appeal from a judgment and an order denying a motion for a new trial." And an undertaking must secure the payment of costs and damages on the appeal in the event of dismissal as well as of affirmance and vice versa; and one omitting either of these essentials is fatally defective.[33]

In some cases, appellants have combined, in one paper, the three hundred dollar undertaking with that filed for the purpose of staying execution of the judgment. This seems to be permissible; but, since the filing of the three hundred dollar undertaking to secure the payment of costs and damages is essential, while the other is optional, the paper so filed will be ineffectual for either purpose, if the former be fatally defective. This proposition was well illustrated in Corcoran v. Desmond,[34] where there was a combination form of undertaking and two appeals, but it could not be ascertained upon inspection, to which appeal it was intended to apply. The court, in ordering the appeals dismissed, said: "Appellants contend that, if the undertaking is insufficient to support the two appeals, then the appeal from the order made after judgment should be dismissed, and the other allowed to stand. In support of this position, we are pointed to the fact that the undertaking contains a further provision and promise for a stay of proceedings under the judgment as provided by section 945 of the Code of Civil Procedure. In this respect, appellants are correct, and there can be no doubt but that the undertaking, so far as it relates to a stay of proceedings, refers to the appeal from the final judgment, and in case of an affirmance of the judgment or dismissal of the appeal, the sureties would become liable on the undertaking. But the undertaking for a stay of proceedings under the judgment is entirely distinct from the bond for three hundred dollars to cover costs on appeal, and the fact that it is found in the same paper with the latter does not change its character as a separate and independent undertaking. An appeal to this court is ineffectual for

[33] See Estate of Fay, 126 Cal. 457, 58 Pac. 936; Hill v. Cassidy, 24 Mont. 108, 60 Pac. 811.

[34] 71 Cal. 100, 103, 11 Pac. 815.

STANFORD LAW LIBRARY

any purpose unless an undertaking in the sum of three hundred dollars is filed to cover the costs of such appeal. Appellants took two appeals, requiring two undertakings of three hundred dollars each. They filed a single undertaking for three hundred dollars, in which they in no wise designate the appeal to which it refers, but, after reciting the two appeals, promise to pay, etc., if the appeal shall be dismissed, and to pay all damages and costs awarded against them on the appeal. In all this, there is nothing whatever to indicate to which of the appeals the three hundred dollar undertaking refers. We think the undertaking fatally defective in this respect and insufficient to support either of the appeals."

But, while one undertaking will answer in the case of appeals taken at the same time from a judgment and from the order on motion for new trial, yet both should be mentioned in the undertaking, else the appeal from the one not mentioned may be dismissed. Thus, in Bornheimer v. Baldwin,[35] where the notice was of appeals from both the judgment and an order refusing a new trial, the undertaking recited the appeal from the judgment, but did not mention the appeal from the order, the court, dismissing the appeal from the order, said: "It does not secure the payment of the damages and costs which may be awarded against the appellants on the appeal from the order, but only on the appeal from the judgment. There is, therefore, no undertaking on the appeal from the order."

It seems to be well settled that any number of appeals taken at the same time and all in legal time in the same action or proceeding, may be made effectual by combining the several

35 38 Cal. 671. See, also, Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; Carter v. Butte Creek etc. Co., 131 Cal. 350, 63 Pac. 667; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Dodge v. Kimple, 121 Cal. 589, 54 Cal. 94; Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633; Hurley v. O'Neill, 24 Mont. 293, 61 Pac. 658. See, also, Hoskins v. Wooden, 4 Idaho, 293, 38 Pac. 933; Kelly v. Leachman (Idaho), 51 Pac. 407. Filing an undertaking in the supreme court after the lapse of the time for filing it with the clerk, does not cure the failure to mention the order: Pacific Pav. Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657.

undertakings in the same instrument. But the several appeals must be mentioned, each with its separate penalty of three hundred dollars.

Probably, if the several appeals are properly distinguished, there need be but one amount specified, which, of course, must be equal to as many times three hundred dollars as there are appeals.

The old Practice Act provided that the undertaking should be "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars." [36] The only change made by the code is the insertion after the word "appeal" of the words "or on a dismissal thereof." [37]

It is not apparent that the amendment had any effect to change the meaning. The obligors were bound under the Practice Act to the same extent as after the amendment.

It has never been held necessary for the principal to sign the undertaking.[38]

Although other forms than that prescribed by the code would no doubt be held sufficient if the intention to become bound to pay the costs and damages were made clear, it is much safer and more convenient to comply with the requirements of the statute. Such has been the general practice.

The rules of construction applied generally to contracts and obligations are applicable here. A reasonable construction will be adopted to accomplish the intention, and slight defects and omissions and defects disregarded.[39]

It is of no consequence, as affecting the liability of those actually signing that others not signing are named in the body of

[36] Laws 1851, p. 106.

[37] Cal. Code Civ. Proc., § 941.

[38] See Curtis v. Richards, 9 Cal. 33; Lissat v. Darling, 9 Cal. 285; Sacramento (City of) v. Dunlap, 14 Cal. 423; Kurtz v. Forquer, 94 Cal. 91, 93, 29 Pac. 413.

[39] See Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415; White Crest Canning Co. v. Sims (Wash.), 69 Pac. 1094, where it was held that a bond on appeal was not insufficient because it ran to the sureties on appellant's (plaintiff's) cost bond, in the trial court, as well as to respondents; nor because it was signed by one of the

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the undertaking. In Kurtz v. Forquer,[40] the court said: "Where several persons are named in the body of an instrument as parties thereto, it is not necessarily invalid, as against those who have signed it, because others named have not signed it." It would be otherwise, however, if it appeared on the face of the instrument, or by proof, that the person sought to be charged signed upon the consideration that other persons named therein would also sign.[41] This doctrine is restricted to cases in which the obligation is joint and several. Where the obligation is strictly several, as where each obligates himself in a certain sum, the failure of one or more others who are named in the undertaking to execute it is immaterial.[42]

The above principle would probably not apply anyhow, if the other person indicated were the principal (appellant) in the case of an undertaking on appeal, since he is primarily bound in the same way, and to the same extent, without signing as if he signed the instrument. This might not hold good, however, if, instead of the plain, direct statutory undertaking, whereby

obligees, there being another and sufficient surety; also Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Shannon v. Consolidated etc. Co., 24 Wash. 119, 64 Pac. 169. An undertaking which recites that the appeal is from both the judgment and order overruling the motion for new trial, and obligates the sureties to pay the penalty in the event of the judgment against the appellants or the dismissal of the appeals, is sufficient under the statute: Vane v. Towle (Idaho), 50 Pac. 1004. Mention of names of sureties in body of bond and their subscription to justification held sufficient execution: Yakima Water etc. Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471. Notary, himself one of the sureties may take affidavits of justification of other surety: Spokane etc. Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119. Appellants may sign bond for themselves and other appellants in Washington. Id. An undertaking reciting that the defendant has appealed from the judgment and also from the order denying a new trial, and that it is executed "in consideration of the premises and of such appeal," is sufficient: Granger v. Robinson, 114 Cal. 631, 46 Pac. 604. An undertaking otherwise good not ineffectual by mistaken indorsement of title: Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

40 94 Cal. 91, 93, 29 Pac. 413.

41 Cavanaugh v. Casselman, 88 Cal. 549, 26 Pac. 515; Kurtz v. Forquer, 94 Cal. 94, 29 Pac. 413.

42 Los Angeles (City of) v. Melbus, 59 Cal. 444, 450.

the obligors become, in effect, principals, the instrument were made in the form of a bond conditioned upon due performance by the appellant.

Aside from the decisions on the question, the code provides that the undertaking, to render the appeal effectual, may be in the same instrument with the other undertakings at the option of the appellant.[43]

Obviously, it would not invalidate the undertaking, otherwise sufficient, that it was in a greater amount than that required by the code. And if it be in a greater amount than three hundred dollars, with a view to staying execution, in a case where a stay bond is required, it may be effectual as an appeal bond, though insufficient to stay execution. Thus, in Zoller v. McDonald,[44] speaking with reference to provisions of the Practice Act, corresponding with similar and corresponding provisions in the code, the court said: "The undertaking on appeal is conditioned that the appellant will pay all damages and costs which may be awarded against him on the appeal, as also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars. It is urged that the undertaking was filed for the sole purpose of staying proceedings, as required by section 352 of the Practice Act, and is not the one required by section 348. Whether it is sufficient as an undertaking to stay execution, under section 352, is a question not necessary for us to determine; for it is sufficient to sustain the appeal, if it contains the substantial requirements of section 348, which we think it clearly does. That the amount exceeds three hundred dollars is no valid objection to it, so long as it contains the conditions required by section 348. The undertakings required by these sections may be embodied in one instrument by section 354. The action is to recover the possession of lands or tenements, and, we think, comes within the terms used in the sixth section of the act regulating the jurisdiction of this court. The motion to dismiss the appeal is, therefore, overruled." So,

[43] Cal. Code Civ. Proc., § 947.

[44] 23 Cal. 136. See, also, Ward v. Superior Court, 58 Cal. 519; Stapleton v. Pease, 2 Mont. 509.

STANFORD LAW LIBRARY

where the undertaking purported to be for the purpose of staying execution as well as to perfect the appeal, and it was objected that the sureties had not justified according to the statute for the latter purpose, the court said: "The undertaking is not merely to render the appeal effectual, but to stay the execution of the judgment, and were the justification insufficient for the latter purpose, it might be ample for the first. It is so in this case, and this fact disposes of the motion."[45] But an instrument, though intended to perform the offices both of an undertaking and a stay bond, must be in a sum sufficient for both, if the purpose for which it is given be not distinctly specified. And a bond for four hundred dollars on appeal from a judgment for five hundred and twenty-five dollars, conditioned for payment of all costs and damages that may be awarded against appellant, and to satisfy and perform the judgment appealed from if affirmed, and to satisfy and perform any judgment which the court may enter, and evidently intended as both an appeal bond and a supersedeas bond, was held insufficient to sustain an appeal.[46]

§ 550. As to what constitutes sufficient execution.

Statutes are generally found prescribing the method of authenticating the signatures of the sureties, and for a verification, in the first instance, before regular justification. There is no particular time before filing at which the undertaking must be executed. It was held that an undertaking on appeal from an order before it was entered was without consideration, and the appeal was dismissed.[47] It is well settled, however, that an undertaking is not invalidated by reason of the signing thereof by the sureties before the notice of the appeal was given, if the undertaking was filed within five days after service of the notice. The undertaking has no effect until filed, and, upon being filed in proper time, becomes an executed and

45 Dobbins v. Dallarhide, 15 Cal. 375. To same effect, Mokelumne Hill etc. Co. v. Woodbury, 10 Cal. 186; State v. California Min. Co., 13 Nev. 212; Aultman v. Nelson, 11 S. Dak. 338, 77 N. W. 584.

46 Sumner (Town of) v. Rogers, 21 Wash. 361, 58 Pac. 214. See, also, Pierce v. Willeby, 20 Wash. 129, 54 Pac. 999; Hewitt v. Lansdale, 26 Wash. 615, 67 Pac. 354.

47 Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

valid obligation upon the sureties.[48] The date of execution is determined by that of the affidavit annexed thereto.[49]

§ 551. Undertakings by surety companies.

Statutes are generally found authorizing the acceptance of judicial bonds and undertakings executed and offered by corporations, chartered to guarantee that, among other forms of liability.[50] Under such statutes, an appeal bond executed by a surety company need not recite that the company has complied with the laws relating to the powers and duties of such companies, required as a condition precedent to its right to do business in the state.[51] Nor is it necessary to file evidence of the agent's authority to sign a guaranty company's name to an appeal bond.[52] But where the sureties on an appeal bond are the parties against whom judgment was rendered, though they be a surety company, the bond is, in effect, without sureties, and hence does not comply with the statute requiring sureties, and the appeal must be dismissed.[53]

§ 552: Dispensing with undertaking by stipulation—Waiver—Estoppel.

While the filing of the undertaking in due form and in the time fixed by law is essential and jurisdictional, in the absence of a waiver, yet the right to waive it by stipulation is expressly recognized in the section of the California code already cited.[54]

48 Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935. See, also, State v. Alta Silver Min. Co., 24 Nev. 230, 51 Pac. 982; Zienke v. Northern Pac. Ry. Co. (Idaho), 65 Pac. 431.

49 Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935.

50 See Laws Oregon 1899, p. 195; Small v. Lutz, 41 Or. 570, 67 Pac. 421, 69 Pac. 825; Mont. Civ. Code 1895, § 604; King v. Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

51 Roberts v. Shelton S. W. R. Co., 21 Wash. 427, 58 Pac. 576.

52 De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795.

53 Smith v. Beard, 21 Wash. 204, 57 Pac. 796. Compare Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. 672.

54 See ante, § 544; also chapter 39. It was held that an appeal could not be dismissed on the ground that there are two appeals, and that the undertaking is not sufficient for both appeals, where there is a stipulation in the transcript that "an undertaking in due form

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The Nevada statutes make no provision for a waiver of the undertaking, and the supreme court refuses to recognize the authority of counsel to waive it by stipulation.[55]

In Utah, it is said that the undertaking is filed for the benefit of the respondent, and is a right which he may waive.[56] In Montana, it seems that the objection that an appeal bond is invalid is waived by not raising it otherwise than in the briefs.[57] In South Dakota, it was held that the insufficiency

was properly made and filed," etc., and counsel cannot be relieved from such stipulation after the expiration of the time within which another bond might have been filed, upon a showing that the undertaking in fact referred to only one of the appeals, without determining which: Estate of Marshall, 118 Cal. 379, 50 Pac. 540. To same effect, Forni v. Yoell, 95 Cal. 442, 30 Pac. 578. Not waived, however, by stipulation to advance case on calendar for hearing: Little v. Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

55 Marx v. Lewis, 24 Nev. 306, 53 Pac. 600. The reasons for not permitting a waiver in the absence of such provision as is found in the California code are thus stated by Massey, J., in this case: "This appeal is attempted to be taken from an order setting aside a judgment by default. No notice of appeal was ever filed or served, and no undertaking on appeal was ever made and filed. We find a stipulation of the attorneys in the record reciting, among other matters, that notice of appeal and undertaking on appeal in the action are waived. The method of procedure in taking appeals is regulated by statute. Section 327 of the Civil Practice Act, in direct terms, confers an authority upon this court to review judgments and orders from which appeals can be taken in the manner prescribed by the act, 'and not otherwise.' Section 331 of the same act requires that notice shall be given, and section 341 provides that, in order to render an appeal effectual for any purpose, undertaking on appeal shall be executed: Gen Stats., secs. 3349, 3353, 3363. Under the language used in these sections, we have no power or authority to review any question presented in this record. The attempt to stipulate a waiver of the notice and undertaking can be of no effect, for the reason that such attempt is doing that which the statute says cannot be done. The language used, 'and not otherwise,' precludes the intention of conferring authority to review appeals under such stipulation as completely as it would were such intention expressed in direct terms. The same may be said of the language used in section 341, supra, requiring the undertaking to render an appeal effectual for any purpose."

56 Hoagland v. Hoagland, 18 Utah, 304, 54 Pac. 978.

57 See Morse v. Calantine, 19 Mont. 87, 47 Pac. 635.

of the bond was waived unless exception thereto was taken in the lower court.[58]

§ 553. Statutes dispensing with undertaking.

Provisions are generally found exempting public officers, and executors, administrators, etc., who have given bonds for faithful performance of duties, from the necessity of giving undertakings on appeal. The policy and theory of such exemptions in the case of public officers is that, in appealing, they act merely as representatives of the state or of particular political division of the state;[59] and in the case of executors, administrators, etc., the estate, in their hands, stands as security for costs and damages on appeal.[60] But it is a well-settled rule that statutory exemptions will not be extended by implication beyond the specified cases, which are exceptions to the general policy of the law protecting respondents on appeal. Accordingly, it was held that the board of education of the city and county of San Francisco did not represent the city and county, and was not included in the exemption from filing an undertaking on appeal provided for in section 1058 of the Code of Civil Procedure, and upon its failure as an appellant to file an undertaking, its appeals must be dismissed.[61] On the same principle, it was held that an appeal from an order disallowing accounts, taken by one who had, prior to the appeal, resigned the position of special administratrix, and who had requested and secured the appointment of the public administrator in her stead, could not be sustained by the official bond given by her as special administratrix, regardless of the correctness of

58 Winton v. Kirby, 6 S. Dak. 98, 60 N. W. 409.

59 See Lamberson v. Jefferds, 116 Cal. 492, 48 Pac. 485; Maricopa County v. Osborn (Ariz.), 40 Pac. 313; Townsend Gas & Elec. Co. v. Hill, 24 Wash. 469, 64 Pac. 778; Scheerer v. Edgar, 67 Cal. 377, 7 Pac. 760; Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

60 See Estate of Corwin, 61 Cal. 160; Kirsh v. Derby, 93 Cal. 573, 29 Pac. 218. But provision is made in California for the exemption of executors and administrators by order of court: See Cal. Code Civ. Proc. 946. And the record on appeal must show such order: Estate of Skerrit, 80 Cal. 62, 22 Pac. 85.

61 Mitchell v. Board of Education; and Reeves v. Board of Education, 137 Cal. 372, 70 Pac. 180.

STANFORD LAW LIBRARY

the action of the court in making the change without the settlement of her accounts; and, in the absence of a separate undertaking, the appeal must be dismissed.[62] Nor will the exemption in the case of an administrator apply where his sureties have been discharged before taking the appeal.[63]

§ 554. Relief in appellate court from defects and omissions.

The supreme court has never assumed the power to excuse, or dispense with, the necessity for filing an undertaking on appeal within the statutory time, compliance with the requirement of the statute therein being uniformly held to be jurisdictional.[64]

It is scarcely necessary to state that, where no undertaking on appeal has been filed within the time required by law, the supreme court has no power, under section 954 of the Code of Civil Procedure, to allow one to be filed.[65] But, where one has been filed which is defective merely, but not vitally defective, the defect may be cured by filing a new and sufficient

62 Estate of McDermott, 127 Cal. 450, 59 Pac. 783. See, also, Estate of Danielson, 88 Cal. 480, 26 Pac. 505, where the letters of the appellant had been revoked before appeal taken.

63 Wells v. Kelly, 11 Utah, 421, 40 Pac. 705.

64 See Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813, where it was held that an ambiguous undertaking filed in the superior court, which did not refer to either of several appeals specified in the notice, must be regarded as if it had never been filed, and in such case the appellate court had no jurisdiction, and could not confer any jurisdiction to hear the appeals, by allowing the subsequent filing of an undertaking in the supreme court. To same effect, Creek v. Bozeman Water Works Co., 22 Mont. 327, 56 Pac. 362. An undertaking on appeal which provides that appellant will pay all damages and costs which may be awarded against them on the appeal, but which omits the clause "or on a dismissal thereof," is not a totally defective undertaking, which absolutely requires the dismissal of the appeal, but is objectionable only for "insufficiency," which may be remedied by the filing of a new undertaking in the supreme court: Jarman v. Rea, 129 Cal. 157, 61 Pac. 790.

65 Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323. See, also, David v. Guich (Wash.), 70 Pac. 497.

one in the appellate court.[66] The code provision allowing this reads as follows:[67] "If the appellant fails to furnish the repuisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal."

The true principle governing the supreme court of California in the case of a defective undertaking was thus stated in Spreckels v. Spreckels:[68] "We are given jurisdiction by the constitution, and the statute is valid only because it is a reasonable regulation of the exercise of that jurisdiction. It is a mere rule of practice, and is just what the statute makes it. It could have been provided that an undertaking should be filed after the motion was noticed, although none had been previously given. The provision is that a new undertaking may be filed in cases where the undertaking already given is so insufficient that but for the privilege of giving a new one appeal would be dismissed. For it is implied that, in some cases, the appeal will be dismissed, unless a new undertaking be filed. It cannot be held, then, that, unless the undertaking is sufficient to sustain an appeal, this court has no jurisdiction to allow a new undertaking. But an undertaking may be so insufficient as not to amount to an undertaking at all. To allow the filing of an undertaking in such a case would not be to allow a new undertaking in lieu of an original, which is all the court is au-

66 See Bay City Building Assn. v. Broad, 128 Cal. 670, 61 Pac. 368; Jarman v. Rea, 129 Cal. 157, 61 Pac. 790; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780; Taleston & Co. v. Casperson, 7 S. Dak. 206, 63 N. W. 908; Coleman v. Perry, 24 Mont. 237, 61 Pac. 129; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; Elwert v. Norton, 34 Or. 567, 51 Pac. 1097, 59 Pac. 1118; Skinner v. Lewis (Or.), 62 Pac. 523. If time be given by the appellate court to file a new bond, the party must be diligent in filing it within the time given; and where a party failed to file a new bond within the time allowed it was held that he was not excused for noncompliance by the neglect of his attorney: Hill v. Cassidy, 24 Mont. 108, 60 Pac. 811.

67 Cal. Code Civ. Proc., § 954.

68 114 Cal. 60, 45 Pac. 1022.

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thorized to do." This seems to have been the rule under the statutes as considered by the court, prior to the adoption of the code. But, in the case where it was intimated most strongly that this practice should prevail, it was held that a failure of the sureties to justify upon notice, after exception to their sufficiency, would require a dismissal of the appeal, unless they justified properly within a time fixed by the court.[69] In the case just referred to, upon motion to dismiss, the court granted the motion, provided that within ten days the appellants failed to file a new undertaking. The new undertaking having been filed, with a proper justification of the sureties, the appeal was decided upon its merits. But where excusable neglect is the ground urged for a failure to file a sufficient undertaking in the lower court, a clear case must be made in the appellate court.[70]

It is now well settled that the failure of the sureties to justify does not affect the jurisdiction of the supreme court to hear and decide the appeal.[71]

69 Stark v. Barrett, 15 Cal. 362.

70 See Newberg Orchard Assn. v. Osborn, 39 Or. 370, 65 Pac. 81.

71 See post, § 568.

CHAPTER 31.

STAY BONDS.

§ 555. The stay of execution a proceeding collateral to and independent of the appeal.
§ 556. Undertaking on appeal and stay bond distinguished—Cases in which undertaking effects a stay.
§ 557. Stay of enforcement upon appeals from orders.
§ 558. Time for filing stay bond not limited—Relief with respect to in appellate court.
§ 559. Powers of lower court suspended after appeal taken.
§ 560. Failure to give the bond leaves lower court without power to stay execution.
§ 561. Effect of appeal upon injunctions.
§ 562. Effect of appeal upon order on motion to set aside judgment.
§ 563. Stay of waste in connection with possessory actions—Foreclosure suits.
§ 564. Where various forms of relief given by same decree.
§ 565. Effect of appeal upon lien of judgment.
§ 566. Effect of appeal upon attachment lien.

§ 555. The stay of execution a proceeding collateral to and independent of the appeal.

The effect of an appeal from a judgment or an order is a subject apart from the result accomplished by executing and filing a stay bond. The latter is a proceeding taken ex parte by the respondent under statutory authority to thwart or prevent one result, or maybe several, results, of the recovery of a judgment against him, these results being usually the sole object for which the action is brought and prosecuted. It is true there would be no place or authority for the proceeding to stay execution but for the appeal; and yet, it is none the less an independent collateral proceeding. Just as a proceeding for a new trial is collateral to the action.

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As previously stated, the appellate proceeding remains unaffected by such ex parte action. The whole inquiry as to the effect of an appeal arises upon executing and filing the three hundred dollar bond, usually and properly designated as the appeal bond. As will also be shown, that bond also stays the execution in a variety of cases. But that special function in such cases is likewise aside from the other and general effect of the appeal.

§ 556. Undertaking on appeal and stay bond distinguished—Cases in which undertaking effects a stay.

The filing of the undertaking discussed in the last preceding chapter stays execution of the judgment in certain cases, which can only be designated by an examination of several sections of the Code of Civil Procedure.

It is provided by section 949 as follows: "In cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 942 stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property, in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state. And except also, where the order grants, or refuses to grant, a change of the place of trial of an action." This section, by its own terms, excepts judgments directing the sale of perishable property, judgments wherein it is adjudged that the defendant is guilty of usurping or intruding into, or unlawfully holding public office, civil or military, within the state, and orders granting or refusing to grant a change of place of trial. It excepts by reference cases provided for in sections 942 to 945, inclusive. Section 942, then, by this reference, withdraws and places among the exceptions judgments and orders directing the payment of money.

Section 943 withdraws and excepts judgments and orders directing assignment or delivery of documents or personal property.

Section 944 withdraws and excepts judgments and orders directing the execution of conveyances, or other instruments, and section 945 withdraws and excepts judgments and orders directing the sale or delivery of possession of real property.

But special provisions are made for stay of execution in various other classes of actions which also constitute exceptions. Section 946 provides, with reference to attachments, as follows: "An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and, unless, within five days after the entry of the order appealed from, such appeal be perfected." Section 1176, relating to actions of forcible entry and detainer, provides that: "An appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs."

This leaves the three hundred dollar bond to operate in cases of appeals by plaintiffs in actions of forcible entry and detainer. Whether it shall operate in case of an appeal by the defendant is wholly discretionary with the judge or justice "before whom the same was rendered."

Section 1257, as amended in 1897,[1] relating to proceedings in eminent domain, provides as follows: "The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title, provided, that, upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards, as provided in section 1251, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned, if not already in possession, or shall have been let into the possession and use thereof, as provided in section 1254, and devote the same to the public use in question; and no motion for a new trial or appeal shall, after such pay-

[1] Stats. 1897, c. 127.

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ment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited as provided in section 1254 may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff."

There is a class of cases in which an appeal from the order has no effect upon its operation, regardless of the character of the undertaking.[2]

This leaves an indefinite number of cases of varied character in which the giving, according to the statute of the three hundred dollar bond operates a stay of proceedings.[3]

2 See post, § 561.

3 See Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070, holding three hundred dollar bond sufficient to stay execution in case of action to foreclose chattel mortgage; Owen v. Pomona Land etc. Co., 124 Cal. 331, 57 Pac. 71, holding three hundred dollars bond sufficient to stay proceedings upon judgment upon an order denying a new trial in an action by a purchaser in possession, to enforce rescission of the contract of sale of land and water stock, and to recover the moneys paid thereunder, including the value of his improvements, where the decree annulled the contract, and adjudged the total sum expended to be a lien upon the property purchased, which was ordered sold to satisfy the lien, and the judgment was ordered to be docketed for any unpaid balance, the case not being covered by any provision of the statute for an additional stay bond; also sufficient to stay proceedings upon appeal from a judgment rendered in favor of the contestant in an election contest: Day v. Gunning, 125 Cal. 527, 58 Pac. 172. No stay in election contest case in South Dakota: Fylpoa v. Brown Co., 26 S. Dak. 634, 62 N. W. 962. Appeals perfected by giving undertaking on appeal held to render subsequent proceeds under judgment ineffective in Morton v. Broderick, 118 Cal. 474, 50 Pac. 644, holding the fact that a new board of supervisors was appointed, qualified, met and organized after the announcement of the decision, and before the entry of judgment removing the board of supervisors, and the taking of an appeal therefrom, was immaterial, and could not affect the legal right of the appealing board to retain the incumbency of the office; Ex parte Queiralo, 119 Cal. 635, 51 Pac. 956, holding that an appeal from an order modifying a decree of divorce, so as to award to the father the custody of the minor children, which by the original decree were awarded to the custody of their mother, suspended and stayed all proceedings under the modifying order, and that orders made pending such appeal, directing the mother to deliver the custody of the children to the father, and punishing her for contempt for refusal to obey such direction, were

It is seen, then, that this undertaking performs two offices: The one it invariably performs, that is, it constitutes an important step toward perfecting the appeal by removing one of the grounds upon which it might become ineffective—that is to say, upon which it might be dismissed; the other it sometimes performs as above stated.

As previously stated, where the case is provided for in any of the other sections above mentioned, or is one in which the appeal cannot affect a stay with any character of bond, this bond does not operate as a stay. Many illustrations are to be found in which the effect of resting the appeal upon the three hundred dollar bond was passed upon.

The giving of the three hundred dollar bond does not stay the enforcement of an order to pay alimony. It was once doubted whether immediate obedience to such an order can be excused by the giving of an appeal bond in any form or amount; also whether it was even appealable.[4] But in Sharon v. Sharon [5] both propositions were decided in the affirmative. The court appeared to consider it a matter of course that the enforcement of the order could be stayed, provided the order was appealable; and, after deciding that it was in the nature of a final judgment for the payment of money, and, after quoting section 942 of the Code of Civil Procedure, said that such an

without jurisdiction and void: Commercial Bank v. Hornberger, 134 Cal. 90, 66 Pac. 74, holding that upon appeal from a judgment in favor of a pledgee of a life insurance policy foreclosing the lien of the pledge, the ordinary bond upon appeal in the sum of three hundred dollars is sufficient to stay execution, and that a supersedeas will issue to prevent a sale of the policy under the decree, pending the appeal; Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61, holding that the attempt to collect the alimony by execution, pending the appeal from the judgment, is a "proceeding upon the judgment," and is stayed pending such appeal by the undertaking required in section 941 of the Code of Civil Procedure; Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58, holding that upon an appeal from a judgment rendered in the superior court upon the contest of an election for directors of a railway company, as between two contestants, all proceedings upon the judgment are stayed upon the execution of the ordinary appeal bond.

[4] Ex parte Cottrell, 59 Cal. 417, 420.

[5] 67 Cal. 185, 199, 7 Pac. 456, 635, 8 Pac. 709.

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undertaking as required by said section, having been executed, wrought a stay of proceedings. Where such an order is for the payment of a specified sum periodically for an indefinite period, the amount of the undertaking to stay execution should be fixed by the trial court. Since, therefore, it is in effect a final judgment for payment of money, and is appealable, it necessarily follows that an undertaking additional to the three hundred dollar bond is required in order to stay execution. No question as to the kind of bond required appears to have been raised since Sharon v. Sharon, though the case has been followed in affirmance of the appealability of such orders in several cases.

That the giving of the three hundred dollar bond does not alone stay the operation of an injunction was settled in an early case in which the court so construed the provisions of the old Practice Act substantially the same, in so far as they bore on that question, as those of the present code.[6]

Prior to the amendment of sections 939 and 963 in 1899, so as to allow appeals from orders appointing a receiver, it was held that the functions of receivers were not suspended by an appeal from an order of adjudication of insolvency appointing a receiver.[7]

Since an appeal may now be taken from all orders appointing receivers, it is apparent that the benefit of an appeal would generally be lost pending the appeal, unless it operated to stay the arm of the receiver.

§ 557. Stay of enforcement upon appeals from orders.

Although the stay undertaking is usually given to stay execution on a judgment, it is also often necessary on appeal from an order. And on appeal from an order on motion for a new trial, a party may stay the execution of the judgment by giving a stay bond. Nor does the fact that a prior or contemporaneous appeal from the judgment was dismissed affect

6 Merced Min. Co. v. Fremont, 7 Cal. 130. Followed in several cases in California and elsewhere (see post, § 561), holding appeals do not operate as a stay.

7 In re Real Estate Associates, 58 Cal. 356; Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147.

the stay effected by such undertaking on appeal from the order, all of which was very fully and clearly explained in Fulton v. Hanna,[8] in which reference was made to provisions in the Practice Act corresponding to provisions of the code. The question came before the court in the form of a petition of the plaintiff for a writ of mandate to compel the county clerk to issue an execution. The defendants had appealed from the judgment against them, and that appeal had been dismissed for want of prosecution and a remittitur issued and filed below. Pending the appeal from the judgment, the defendants moved for a new trial. After the dismissal of the appeal from the judgment, the court made an order denying the motion for a new trial, and the defendants appealed from that order. On that appeal, they gave an undertaking to stay execution of the judgment according to the requirements of the statute. In denying the petition for the writ, the court, per Sprague, J., said: "I have no doubt this appeal operated a stay of execution upon the judgment pending such appeal, and the circumstance that a prior appeal from the judgment had been dismissed by this court for want of prosecution before an appeal from the order denying defendant's motion for a new trial therein had been perfected, cannot change the ef-

8 40 Cal. 278, 280. To same effect, Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Baldwin v. Superior Court, 125 Cal. 584, 58 Pac. 185. The second of these cases decided that the dismissal of an appeal from the judgment did not affect the efficacy of a stay bond on appeal from the order denying a new trial to stay execution of the judgment. The last case is to the same effect, the court saying: "This is a petition for a writ of supersedeas to stay all proceedings upon a certain judgment against petitioner pending an appeal. The judgment was rendered in the superior court against petitioner, and in favor of one Roche, for a certain sum of money; petitioner appealed from an order denying his motion for a new trial and gave an undertaking in double the amount of the judgment, but has not appealed from the judgment; and the plaintiff in the action is proceeding to enforce the judgment by execution, notwithstanding the undertaking, upon the theory that the execution of a judgment directing the payment of money cannot be stayed upon an appeal from an order denying a new trial, where there is no appeal from the judgment itself. It was held otherwise, however, in the recent case of Holland v. McDade, 125 Cal. 353, 58 Pac. 9, and upon the authority of that case the petition must be granted."

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fect of an appeal from the order. Although an appeal from an order denying a motion for a new trial is in a different and distinct line of proceeding from a direct appeal from a judgment, still, a reversal on appeal from the order denying a motion for a new trial and remanding the cause for retrial as effectually vacates the judgment as a reversal of the judgment upon a direct appeal therefrom; and when a full bond is given on appeal from such order, as provided in section 349 of the Practice Act, I can see no reason why execution is not as effectually stayed upon the judgment pending such appeal as it would have been pending a direct appeal from the judgment, with a like bond or undertaking. The fact that a direct appeal from the judgment had been dismissed certainly does not place the appellant in any different or more unfavorable position in respect to his appeal from the order than he would have occupied had no direct appeal from the judgment ever been taken within the time prescribed by the statute."

§ 558. Time for filing stay bond not limited—Relief with respect to in appellate court.

The bond to stay execution may be executed and filed at any time prior to the execution of the judgment or order. It differs in this respect from the undertaking required to render the appeal effective. Time is of no importance, as bearing upon the validity or effect of the undertaking to stay execution of the judgment, commonly known as the stay bond.[9] With this, the appellate court has nothing to do as regards the validity of the appeal. If it be invalid for any reason, advantage is to be taken of that fact in the lower court. In fact, most questions touching the rights, obligations and remedies of the parties under such undertakings usually come before the lower court in the first instance. The question sometimes

[9] See Hill v. Finnigan, 54 Cal. 493, where the court said: "The undertaking on appeal—the filing of which by section 940 of the Code of Civil Procedure, is necessary to render the appeal effectual for any purpose—is the three hundred dollars undertaking mentioned in section 941. This is made manifest by reading the several sections in their order; and it was, in effect, so held in Schacht v. Odell, 52 Cal. 449; and Hill v. Finnigan, 54 Cal. 311. There is nothing in section 942, or elsewhere in the code, which prohibits the making

comes before the supreme court, however, in the form of application for original writs.

A special provision is made, however, as to stay bonds upon orders dissolving attachments. They must be filed within five days after the entry of the order appealed from.[10]

The above statement, that the appellate court has nothing to do with the proceeding to stay execution is true only as to the original proceeding. In the exercise of its supervisory and appellate jurisdiction, that court may make various orders intended to protect the right of appeal.[11] Where the sureties to the undertaking to stay execution fail to justify, and the time is past for that to be done in the lower court, the supreme court has authority to permit such an undertaking to be filed after an appeal has been taken. The sureties on such undertaking may justify before a justice of the supreme court. That was done in Tompkins v. Montgomery,[12] where the court ordered that "the application of the appellant for leave to file an undertaking to stay execution of judgment is granted, and upon the sureties in such undertaking justifying before the chief justice of this court, upon notice to the respondents, the said undertaking may be filed, and thereupon the execution of

and filing of a stay undertaking at any time before the execution is satisfied by sale under it. An execution may be issued upon the judgment after the cause has been brought here on appeal, and after the appeal it may be stayed by proper undertaking filed below. Whenever the stay bond, or undertaking has been properly executed, (and the sureties have justified if excepted to) or the court below shall have dispensed with security in cases where it has power so to do, the appeal is perfected in the larger sense in which the words are used in section 946."

10 See Cal. Code Civ. Proc., § 946.

11 Discussion of supersedeas and other remedies originating with supreme court cannot be undertaken here except to a slight extent. Supersedeas granted in Root v. Bryant, 54 Cal. 182; Baldwin v. Superior Court, 125 Cal. 584, 58 Pac. 185; State v. Board of Education, 19 Wash. 8, 67 Am. St. Rep. 706, 52 Pac. 317. Proper function of supersedeas discussed in Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010. That appellate court has inherent power to preserve the subject of the litigation and status of the parties pending the appeal: See Finlen v. Heinze (Mont.), 69 Pac. 829, rehearing denied 70 Pac. 517.

12 116 Cal. 120, 124, 47 Pac. 1006.

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the judgment shall be stayed until the determination of the appeal."

The necessity for thus resorting to the supreme court arises from the fact, which was stated in this case, that the code contemplates but one proceeding for the justification of sureties in the lower court. In McCracken v. Superior Court,[13] the court referred to a statute never embodied in the Practice Act or in the code, nor, on the other hand, expressly repealed, as authority for this practice. But the court also referred to a prior decision, rendered under the code, wherein that statute was not simply referred to, but wherein it was said: "But the statute does not treat of undertakings in the supreme court, and we have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right."[14] But the appellate court will not exercise such power where a stay bond has been filed in the court below, and the sureties thereon have failed to justify, when excepted to, if there is no showing of accident, surprise, inadvertence, or excusable neglect in the failure of the sureties to justify, or of the appellant to procure other sureties. Accordingly, it was held that the mere fact that the sureties were absent from the county was not a sufficient excuse, where it was not shown that they were notified or requested to attend, or that they were absent without the consent of the appellant, or that any effort was made to secure their attendance or to procure other sureties.[15] Nor will the supreme court make an order which could only be made by a court exercising original jurisdiction to grant relief by injunction.[16]

§ 559. Powers of lower court suspended after appeal taken.

The perfecting of an appeal has the effect to deprive the lower court of jurisdiction to do anything not pertaining to the enforcement of the judgment or order which would tend to render the appeal abortive or defeat its purpose. This re-

13 86 Cal. 74, 78, 24 Pac. 845.

14 Hill v. Finnigan, 54 Cal. 493.

15 Williams v. Borgwardt, 115 Cal. 617, 47 Pac. 594.

16 See Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010.

sults from the taking and pendency of the appeal. And where the court had prematurely and for that reason erroneously denied a motion for a new trial, and after an appeal had been taken from that order, attempted to settle and certify the statement and then deny the motion, the court said: "There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent on suggestion, motion, or ex mere motu, set it aside at any time before an appeal is taken from it. Such an order, however, is valid until set aside or reversed on appeal; and where an appeal is taken from it, the jurisdiction of the court a qua is suspended, so that, pending the appeal, the court below cannot vacate and set aside the order appealed from. Whence it results that the order appealed from, denying defendant's motion for a new trial, and the judgment entered in the case, must be reversed."[17] Numerous illustrations of this principle could be given. Thus, it was held that, after an appeal was taken, the trial court could not amend the judgment;[18] that, pending an appeal, the trial court had no jurisdiction to allow an amendment to any pleading;[19] that, after a case had been appealed, the trial court had no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by a bill of exceptions [20] or to set it aside;[21] that it could not amend its findings after appeal taken;[22] that

17 Stewart v. Taylor, 68 Cal. 5, 7, 8 Pac. 605. To same effect, Bryan v. Berry, 8 Cal. 135; Peyoke v. Keefe, 114 Cal. 215, 46 Pac. 78; Clark v. Manchester, 56 N. H. 506; State v. California Min. Co., 13 Nev. 210; Holland v. State, 15 Fla. 553, holding also, that the case cannot be dismissed after appeal so as to affect the appeal.

18 Bryan v. Berry, 8 Cal. 130; San Francisco Sav. Union v. Myers, 72 Cal. 161, 13 Pac. 403; Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237.

19 Kirby v. Superior Court, 68 Cal. 604, 10 Cal. 119.

20 Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480. To same effect, San Francisco Sav. Union v. Myers, 72 Cal. 161, 13 Pac. 403.

21 Peycke v. Keefe, 114 Cal. 212, 46 Pac. 78; Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605; Canada Settler's Loan etc. Co. v. Murray, 20 Wash. 656, 56 Pac. 368.

22 Boggs v. Smith, 53 Cal. 88; Merchants' Nat. Bank v. McKinney, 6 S. Dak. 58, 60 N. W. 162; Moore v. Booker, 4 N. Dak. 543, 62 N. W. 607; Rudolph v. Herman, 4 S. Dak. 203, 56 N. W. 122. But it

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it should not proceed with a retrial after an appeal from an order granting a new trial, although only the three hundred dollar bond was given;[23] that, after an appeal taken, the lower court could not set aside a judgment of dismissal entered by the clerk;[24] that the court cannot, under the pretext of preserving one in the office of director, to which, by its judgment, declared him entitled, enjoin others from proper proceedings to oust him from such office, or to punish other directors for contempt for refusing to recognize such person as a director;[25] that, after having approved a stay bond in a certain amount given in compliance with its order, it cannot thereafter require a bond to be given in a larger amount;[26] that, pending an appeal from an order directing the payment of a claim, the superior court has no jurisdiction to punish the administrator for a contempt of its authority in failing or refusing to pay the claim;[27] that, pending an appeal from an order setting aside a judgment of dismissal, the court cannot further proceed with the cause.[28]

The appeal maintains the status of appellant's rights as if no judgment had been entered.[29] And the pendency of an ap-

may make the record conform to the actual rulings: Wasatch Min. Co. v. Jennings, 14 Utah, 221, 46 Pac. 1106.

23 Ford v. Thompson, 19 Cal. 118. See, also, Owen v. Pomona Land etc. Co., 124 Cal. 331, 57 Pac. 71. But the filing of a stay bond upon appeal from the judgment does not stay action upon a motion for a new trial; and the court has power, pending such appeal, to grant a new trial. Proceedings on motion for a new trial are not in the direct line of the judgment, but are independent, and collateral thereto: Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Rayner v. Jones, 90 Cal. 78, 27 Pac. 24.

24 Livermore v. Cambell, 52 Cal. 76.

25 Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58. Same principle, Finlen v. Heinze (Mont.), 69 Pac. 829, rehearing denied, 70 Pac. 517.

26 Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070.

27 Ex parte Oxford, 102 Cal. 656, 36 Pac. 928. To same effect, Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211; Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617.

28 Kaufman v. Superior Court, 108 Cal. 446, 41 Pac. 476.

29 See Matter of Moss, 120 Cal. 695, 53 Pac. 357; State Investment Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549. The first case

peal at the time of the motion to offset the judgment is not ground for denial of the motion, but would be cause for the court's retaining the motion until the final decision upon the appeal.[30]

The duty of the lower court to refrain from enforcing the judgment is not altered by the pendency of a motion to dismiss the appeal.[31]

In Wyoming, the lower court may reserve questions for the supreme court. Such reservation was held not to deprive the lower court of jurisdiction to dismiss.[32] The court may proceed upon any matter not covered by the judgment or order appealed from.[33]

The legal consequences of an appeal, above set forth and explained, results from giving the three hundred dollar bond, and the power of the court is entirely suspended under a stay bond, if its scope is sufficiently broad as to cover all the relief granted;

was an appeal by an incompetent from an order appointing a guardian for him, upon the ground of his alleged incompetency. The court is sustaining the appeal against a motion to dismiss it, said: "The notice of appeal is signed by Messrs. Nicol & Orr, who are attorneys of this court, and who appeared for the appellant Moss, in the proceeding in the superior court in which the order of guardianship was made; and it is contended by respondents that under section 372 of the Code of Civil Procedure, Moss could take an appeal only by his general guardian or by a guardian ad litem appointed by the court. But that section does not apply to a case where the very question involved is the validity of the order of guardianship itself, and where the appeal is taken directly from that order. That section applies only to a case where the order of guardianship has been finally established. But no judgment or order of a superior court is final when an appeal from it is duly pending. If the order appointing a guardian for the appellant be erroneous, it will be reversed; and the appellant's right to the control of his property cannot be held as finally concluded against him by an order from which he has appealed, and from which he has a right to appeal."

30 Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786.

31 Hale & Norcross S. M. Co. v. Fox, 122 Cal. 56, 54 Pac. 270.

32 Foote v. Smith, 8 Wyo. 510, 58 Pac. 898.

33 State v. District Court, 22 Mont. 241, 56 Pac. 281, holding court could appoint a receiver.

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and if not so broad, it is suspended to the extent to which the bond is effectual, according to the statute or code provision authorizing it. The California code provision is as follows:[34] "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy, property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from."

§ 560. Failure to give the bond leaves lower court without power to stay execution.

On the other hand, if no bond be given, or if the bond given be insufficient, or does not have the legal effect to stay enforcement of the order or judgment, the court lacks the power to order a stay of proceedings for its enforcement. Such has always been the effect of provisions on the subject; hence, the early decisions are in point, In Mokelumne Hill Min. Co. v. Woodbury,[35] plaintiffs had obtained judgment in the lower court, and the defendant filed notice and an undertaking on appeal. The plaintiff, having excepted to the sufficiency of the sureties, they failed to justify to the satisfaction of the clerk, who proceeded to issue execution. The defendant then applied to the judge of the district court, who granted an order of supersedeas, from which order the plaintiffs appealed. The supreme court ordered the supersedeas vacated. It necessarily follows that, upon giving a proper and sufficient bond, no order of the lower court is required to effect a stay.

§ 561. Effect of appeal upon injunctions.

An examination of the code provisions discloses no provision for a bond to suspend the operation of an injunction. Neither the three hundred dollar bond nor any of the stay bonds which are

34 Cal. Code Civ. Proc., § 946.

35 10 Cal. 188. See, also, note to Commonwealth v. Magee, 49 Am. Dec. 516; Gross v. Kelleher, 73 Cal. 639, 15 Pac. 362; Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

authorized, can have that effect, because a stay of proceedings signifies the cessation and prevention of something being done or about to be done of a positive nature, and an injunction merely continues the original status of persons or things, being a negative force. This was well expressed in an early case, the statutes being pro haec vice substantially as at present. The lower court had issued a preliminary injunction against the defendants. On appeal from the restraining order they gave the ordinary three hundred dollar undertaking. For a continuance of the acts enjoined they were proceeded against for contempt, but the court refused to punish them for contempt, taking the view that the operation of the injunction was suspended by the appeal. Upon application for mandate to compel action by the lower court for the protection of the plaintiff's right, the supreme court awarded the writ, the opinion being, in part, as follows: "The first question raised by the facts of this case is this: Did the appeal supersede the effect of the injunction? or, Did the injunction remain in full force pending the proceedings on appeal? The stay of proceedings, pending an appeal, has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted; it operates so as to prevent any future change in the condition of the parties. . . . . The language of this three hundred and fifty-sixth section is general, and would at first seem to include the appeal from an order granting an injunction; but, upon examination of the provisions of sections 349 to 352 inclusive, it will be seen, that in all those cases the party is required by the judgment or order to do some affirmative act, not to refrain from doing a thing. This act, if completed, would change the condition of the parties, and render a reversal of the judgmeut in the supreme court partially ineffectual. But when a party is restrained by injunction, he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal, with an undertaking of three hundred dollars, would have the effect of staying the injunction itself, then the plaintiff would have no remedy, and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not

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reach a case of injunction."[36] The rule rests not only upon the construction of the statute, but from the nature of the remedy. An injunction can only be granted to prevent great irreparable injury; and it cannot be assumed without involving an absurdity that the amount of the undertaking would be fixed in advance upon any standard fair or just to both parties.

§ 562. Effect of appeal upon order on motion to set aside judgment.

Until so determined the presumption is in favor of the correctness of the action of the lower court. The supreme court could give no relief in these cases, for instance, by supersedeas staying the operation of an injunction, without, at least, modifying the judgment or order appealed from. It is true in such cases that if the action appealed from is found to have been erroneous, it will then appear that the appellant was deprived of the use of his property or other interest by the granting or continuance of the injunction. But if a supersedeas should be granted, and in the end, it appear that the action of the lower court was proper, then it would be equally apparent that he has been in the meantime deprived of the use of his property or exercise of a right.[37]

The application of the principle is not defeated by a provision annexed to a perpetual injunction embodied in the final judgment that the defendant may take steps to vacate the injunction upon complying with a specified condition on his part.[38]

36 Merced Min. Co. v. Fremont, 7 Cal. 130. See, also, Swift v. Shepard, 64 Cal. 425, 1 Pac. 493; Heinlen v. Cross, 63 Cal. 45; Estate of Crozier, 65 Cal. 334, 4 Pac. 109; Slaughter house Cases, 10 Wall. 297.

37 See Swift v. Shepard, 64 Cal. 423, 1 Pac. 493.

38 Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452. In this case in course of a learned opinion, Justice Temple said: "The parties seem in entire accord as to the law applicable to the case, but they differ as to the construction of the judgment or decree entered in the suit for an injunction. On one side it is contended that a final decree was entered granting a perpetual injunction with a provision that, on certain conditions, the court would vacate the judgment, but that it was not an interlocutory order which implied another and final decree. The petitioner contends that the decree was a conditional dissolution of the injunction, a judgment to take effect

Under the code provisions of Utah, as construed by the supreme court of that state, it seems that a stay bond in an amount fixed by the lower court may relieve a party from the operation of an injunction pending an appeal.[39] The same construction appears to be given the Washington statutes.[40]

It is also an application of the principle above explained which forbids an appeal from an order dissolving an order, dissolving an injunction having any effect to revive it, or an appeal from an order refusing to grant an injunction having any effect to reverse the action of the lower court and thus give it an affirmative effect. The question was directly presented in Hicks v. Michael,[41] where the appellant applied to the supreme court for a writ of mandate to compel the lower court to fix the amount of a suspensive appeal bond, on an appeal from an

when the defendants in that action should make it appear that they had remitted the improper charge of one hundred and thirty-five dollars. If it be admitted that the judgment entered is final, in the sense that an appeal may be taken from it, the consequences, so far as effects this application, will be the same whichever view is adopted. Section 946 of the Code of Civil Procedure contains the following: Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. Certainly the injunction was in effect at once upon the rendition of the judgment. No condition was imposed upon the plaintiffs to be performed before it became operative. When the existence of the judgment affords all the relief awarded, and there is no proceeding to be had under it, the stay provided for in section 946 does not apply to it. That section does not provide that the judgment shall be suspended, but that no further proceedings shall be had upon the judgment, or upon the matters embraced therein. The motion of petitioner to have the injunction dissolved, made in pursuance of the permission contained in the decree, was a proceeding upon the judgment and upon the matters embraced therein. Petitioner contends that the judgment, being for an injunction, is not suspended by the appeal, and that by the terms of the decree the right to the injunction is made conditional. His injunction continues, notwithstanding the appeal, and its continuance must still be subject to the condition that it may be ended."

39 See Elliott v. Whitmore, 10 Utah, 238, 37 Pac. 459.

40 State v. Superior Court of King Co. (Wash.), 70 Pac. 256.

41 15 Cal. 107, 110.

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order refusing to grant an injunction and dissolving a restraining order. In denying the petition, the court said: "The appeal, then, which the plaintiff has taken, or proposes to take, is only from an order refusing an injunction, and the simple question is presented, whether an appeal from an order of this character can operate to create an injunction, or to prolong a restraining order, until the ruling of the judge can be reviewed by the appellate court. It is clear that no such effect can be given to an appeal, even when the most ample bond of indemnity is tendered. Where an injunction has been refused, there is nothing operative. A stay can only be sought of that which has an existence, and by its operation is supposed to work injury to the appellant. It is, therefore, from the nature of the case, only of orders or judgments which command or permit some acts to be done, that a stay of proceedings can be had."

Mandatory injunctions are not within the principle of the above rule. Their execution involves affirmative action by the party enjoined. An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered. If an appeal from a judgment or an order granting such an injunction did not stay the operation of the judgment or order, its reversal would often prove entirely ineffectual.[42] And although the effect of a prohibitory injunction is not stayed or suspended by an appeal therefrom, yet the court cannot by attempting to enforce a prohibitory injunction, indirectly enforce a mandatory injunction, the effect of which is suspended by an appeal; accordingly, where appellants were ordered to remove certain trade signs from their premises, and prohibited from

42 Stewart v. Superior Court, 100 Cal. 543, 547, 35 Pac. 156, 563. See, also, Dewey v. Superior Court, 81 Cal. 68, 22 Pac. 333; Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436; Schwartz v. Superior Court, 111 Cal. 106, 43 Pac. 580; State ex rel. etc. v. Superior Court, 28 Wash. 403, 68 Pac. 865; Maloney v. King, 25 Mont. 256, 64 Pac. 668, holding also that the objection that a decree granting a perpetual injunction is void, as not being within the issues, will not be considered on a motion to stay the injunction during the pendency of the appeal.

using the trade name thereon, and, in fact, made no use of such name pending the appeal, except upon the signs which they claimed were the property of their lessors, it was held that they could not be punished for contempt for violation of the prohibitory injunction for merely allowing the signs to remain in the same condition pending the appeal; also that they could not be required to abandon their business or the premises, or be punished for not doing so pending the appeal.[43] In keeping with the principle which forbids an appeal having the effect to dissolve an injunction, or to revive an injunction which has been dissolved, it is well established, for like reasons that, an appeal from an order setting aside a judgment cannot be given effect to revive the judgment. Thus where the appeal was from a judgment, or order, annulling and revoking the probate of an alleged will, and pending the appeal the lower court appointed a special administrator, the supreme court, in denying an application for certiorari to review the last-mentioned order, said: "It is insisted by petitioner that his appeal stayed all further proceedings in the court below, based upon or having relation to the order of revocation. The contention in its logical results, is that the will still remains the probate will of decedent, and the petitioner still the acting executor, with power to collect assets, pay debts, and do all other acts and things which an executor may do. But the effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. The effect of an appeal is to stay all proceedings upon a judgment or order appealed from. But the appointment of a special administrator was not a proceeding upon the order of revocation, or upon matters embraced therein, but an independent order, which was itself appealable. The code does not provide that an order appealed from shall cease to exist—be annulled—but that it cannot be further enforced by a proceeding upon it."[44]

[43] Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580.

[44] Estate of Crozier, 65 Cal. 332, 4 Pac. 109.

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Moreover, the only question raised by an appeal from a judgment perpetuating, or an order granting an injunction, is whether the injunction was properly perpetuated or granted, and that question must be determined upon the record.

§ 563. Stay of waste in connection with possessory actions—Foreclosure suits.

The provision relating to possession of the property by the appellant during the pendency of the appeal, and the commission of waste thereon, has been construed somewhat differently from what it seems upon first impression to mean. It seems to imply that the execution of a judgment directing a sale of real property would not be stayed without a bond for waste as well as one for use and occupation. But it was held otherwise under a similar provision in the Practice Act.[45]

The section was explained in Englund v. Lewis,[46] as follows: "This section is double, and provides for two distinct undertakings upon two distinct kinds of judgments, one directing a sale of real property, and the other directing the delivery of the possession of real property. In a case where the judgment directs a sale, the undertaking need only provide security against waste, unless such sale is of mortgaged premises and the judgment provides for the payment of a deficiency, in which case it must provide for the payment of such deficiency. In such a case, no provision need be inserted in the undertaking for the payment of the value of the use and occupation of the premises pending the appeal, for the obvious reason that the judgment creditor does not become entitled to the value of the use and occupation until after a sale has been made. Where the judgment directs the delivery of the possession of real property, the undertaking must provide against waste and for the payment of the value of the use and occupation, and for

45 See Whitney v. Allen, 21 Cal. 236.

46 25 Cal. 327, 354. See, also, Painter v. Painter, 98 Cal. 627, 33 Pac. 483; Boob v. Hall, 105 Cal. 413, 38 Pac. 977; Arrington v. Wittenberger, 11 Nev. 287; Northwestern etc. Bank v. Griffith, 17 Wash. 98, 49 Pac. 223; State v. Superior Court, 14 Wash. 365, 44 Pac. 859.

those two only, for there can be, in such a case, no question as to deficiency. Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent, the statute discriminates in favor of mortgage and against all other liens." From this it is also seen that (1) an undertaking to stay enforcement of a decree of foreclosure providing for a deficiency judgment, must in order to stay enforcment of the deficiency portion, provide for its payment; and (2) that it is otherwise when the appeal is from a decree of sale other than a mortgage foreclosure, in which case payment of the deficiency judgment need not be provided for.

Substantially the same expressions as in Englund v. Lewis were used in Krelling v. Krelling, a similar case.[47] That at the time of the entry of judgment directing issuance of a writ of restitution, defendant's lease has expired is not ground for the court's refusal to fix the supersedias bond staying issuance and service of the writ.[48]

A bond to stay execution on an appeal from a decree foreclosing a mechanic's lien must be given under section 945 of the Code of Civil Procedure, concerning appeals from judgments or orders directing the sale of real property; and a mere bond in double the amount of the judgment against the owner of the premises, not conditioned as required by section 945, does not have the effect to stay the execution of the judgment.[49]

§ 564. Where various forms of relief given by same decree. Various forms of relief are sometimes granted in and by the same decree; and to determine the character of security required to stay enforcement of any pending appeal, reference may be necessary to more than one section of the code, or to more than one provision of the same section. This is seen from the language of the court in Englund v. Lewis[50] as follows: "Ous conclusions are, that where there is a money judgment only, the

[47] 116 Cal. 458, 460, 48 Pac. 383.

[48] State v. Benson, 21 Wash. 580, 59 Pac. 501.

[49] Central L. & M. Co. v. Center, 107 Cal. 193, 40 Pac. 334.

[50] 25 Cal. 327, 356.

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undertaking, in order to stay proceedings, must be in double the amount of the judgment; and if in addition to a money judgment there be a judgment for the delivery of documents, or the execution of a conveyance, or a sale of real property, or for the delivery of real property, an additional bond or bonds, as the case may be, must be given in order to stay proceedings upon each branch or part of the judgment, and if there be a part or branch of the judgment as to which no bond is given, proceedings upon such branch or part are not stayed. In the case of a judgment which directs the execution of a conveyance or other instrument, of course no bond, except for the money branch of the judgment, if such there be, is required, the appellant being required to execute and deposit with the clerk the conveyance or other instrument instead of the bond exacted in other cases."

§ 565. Effect of appeal upon lien of judgment.

With reference to the effect of an appeal upon the lien of the judgment earlier decisions were somewhat conflicting. But as the controversy giving rise to such conflicts was settled by a change in the wording of the statute by an amendment in 1874, it is not necessary, even if practicable, to discuss the prior decisions in detail. That amendment was an addition to the section giving a lien to the judgment,[51] reading as follows: "The lien continues for two years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment ceases." In 1895 this part of the section was again amended to read as follow: "The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment, and any lien by virtue of an attachment that has been issued and levied in the action, ceases."

To effect the lien the undertaking must be sufficient to stay execution. If it be so defective in form as not to meet the requirements of the statute or if it be fatally defective in any

[51] Cal. Code Civ. Proc., § 671.

other respect, or if upon objection to the sureties properly taken they fail to justify the lien continues.[52]

A judgment lien must have a commencement. If it exists, its commencement is the day when the judgment was docketed, for it is by docketing the judgment that the lien is created.[53]

The provision of the Practice Act was construed to exclude from the period of subsistence of the lien the period of the pendency of an appeal with a stay bond in estimating the two years from the docketing in which the judgment lien subsisted.[54] But it is seen that that is all changed by the present code provision. The lien is absolutely removed by that act, the security afforded by the bond being substituted for that given by the judgment.

Under the former rule, any period of time transpiring between the docketing of the judgment and the stay of proceedings was to be excluded in the computation. And a stay of proceedings, either by an order of the court pending a motion for a new trial, or by an appeal with a stay bond, merely suspended the running of the statutory time. It did not, however,

52 See Englund v. Lewis, 25 Cal. 327, 355. No judgment lien is created upon real property belonging to a judgment debtor until the judgment is docketed: Code Civ. Proc., § 671; Eby v. Foster, 61 Cal. 282. Docketing consists in an entry in the docket in the clerk's office of a brief abstract of the judgment, under eight heads mentioned in Code of Civil Procedure, section 672. The law also makes it the duty of the clerk to enter in this docket the title of each cause, with the date of its commencement, and a memorandum of every subsequent proceeding therein with the date thereof: Pol. Code, subd. 3, § 4204. If the clerk does his duty under this last provision, the record will show when the judgment-roll was made up, and it will then be presumed, in the absence of an entry to the contrary that the docketing was done at that time. To create a lien upon real property these things must be done: Eby v. Foster, 61 Cal. 282.

53 Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Rodgers v. Druffel, 46 Cal. 654; Code Civ. Proc., § 671. And the time must appear by the record; for as the lien is purely statutory, neither its existence nor commencement can be proven by parol: Racouillat v. Requena, 36 Cal. 651; Norris v. Jackson, 91 Wall. 125; Ebey v. Foster, 61 Cal. 282, 287.

54 Barroilhat v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193, n. 195.

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postpone the commencement of the statutory limitation until the stay had ceased.[55]

§ 566. Effect of appeal upon attachment lien.

After a judgment in favor of a defendant whose property has been attached the attachment is discharged, and the property released thereform. An appeal by the attaching plaintiff does not affect such discharge, or affect the right of the defendant to dispose of the property, notwithstanding that the judgment is reversed on the appeal.[56]

55 Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193.

56 Loveland v. Alvord Consol. Q. M. Co., 76 Cal. 562, 18 Pac. 682; Cal. Code Civ. Proc., § 553.

CHAPTER 32.

JUSTIFICATION OF SURETIES.

§ 567. Statutory changes.
§ 568. Effect of changing—Consequences of failure of sureties to undertaking to justify.
§ 569. Of the notice of justification—Power of court to shorten time.
§ 570. Of the proceeding to justify.
§ 571. With new sureties, new undertaking necessary.
§ 572. Waiver of justification.
§ 573. No justification by surety company required.
§ 574. Stay pending proceeding to justify.
§ 575. Power of superior court with respect to undertakings in justices' courts.

§ 567. Statutory changes.

Various amendments were made in the California statutes governing the justification of sureties upon undertakings. Amendments to the section on the subject in the Practice Act were made in 1854 and in 1866.[1] The section of the Code of Civil Procedure as first adopted was somewhat different, in that it left off the clause relating to the affidavits of the sureties. In 1874 an amendment was made to correct a mistake, the code provision providing that notice should be given to the appellant the respondent being obviously intended. In 1880 the section was amended to read as it stands at present, constituting section 948, as follows: "The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections 941, 942, 943, and 945, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with the notice of such exception, justify before a judge of the court below, or county clerk, upon five days' notice to the respondent

[1] Laws 1854, p. 65; Laws 1865-66, p. 708.

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of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

In 1895 an amendment was made to section 954 of the Code of Civil Procedure by adding the following: "When it is made to appear to the satisfaction of the court, or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, the last-named court, or a judge thereof, may order the giving of a new bond, with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given."[2] This amendment authorizes a proceeding distinct and independent from the ordinary justification provided for by section 948. It contemplates: 1. That a perfect bond had been prepared and filed in the first instance, and that the imperfections thereto subsequently arose; 2. It contemplates appeals from money judgments; 3. It gives the court or judge authority only to order a new bond; and 4. It in no way provides for a further or second justification of the sureties upon the original bond.[3]

§ 568. Effect of changing—Consequences of failure of sureties to undertaking to justify.

One of the amendments—that of 1866—had the effect to render a failure to justify upon notice of no importance as

2 Statutes and Amendments to the Codes of California of 1895, p. 59.

3 Boyer v. Superior Court, 110 Cal. 401, 403, 42 Pac. 892.

bearing upon the validity of the appeal with a three hundred dollar bond; and, as has been previously stated, the appeal is in no way connected with the question of whether a stay bond is given or not, or whether it be sufficient or insufficient when given. Prior to the amendment of 1866, the language of the statute was that upon the failure of the sureties to justify, the appeal should be "regarded as if no such undertaking had been given." The section, as amended in 1866, omitted this clause and substituted in place of it that now seen in section 948, declaring the consequences of a failure to justify to be that "execution of the judgment order or decree appealed from is no longer stayed." It will be seen that the statute attaches no legal consequence to a failure to justify other than as above stated; but such consequence it attaches alike to the appeal bond and the stay bond. In the cases in which the appeal bond is not by the code provisions allowed to operate as a stay, and in all cases where the appellant would derive no benefit from a stay, there is nothing to be gained by having the sureties justify and the objections of the respondent to their sufficiency need not be noticed. It is otherwise, however, if it be one of the cases not specially provided for with respect to a separate stay bond wherein the three hundred dollar bond operates a stay, and a stay is desirable. A failure to justify upon objection deprives the bond of its office as a stay.

The decisions since the amendment of 1866 above mentioned are in harmony upon these propositions. It was decided in Schacht v. Odell,[4] that a failure of the sureties to justify did not render the appeal ineffectual but merely avoided the stay of execution, and that decision has been followed and affirmed in later cases. The gist of all the decisions was pithily expressed in Swasey v. Adair,[5] in these words: "The sufficiency of the sureties was excepted to, and they failed to justify. This is no ground for dismissing the appeal. It only affects the stay of execution."

[4] 52 Cal. 447. See, also, Tompkins v. Montgomery, 116 Cal. 123, 47 Pac. 1006; Hill v. Finnigan, 54 Cal. 314; Wittram v. Crommelin, 72 Cal. 90, 13 Pac. 160; Swasey v. Adair, 83 Cal. 138, 23 Pac. 284; Threlkeld v. O'Neal, 26 Mont. 209, 66 Pac. 940.

[5] 83 Cal. 137, 23 Pac. 284.

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The fact that the judge of the lower court, upon a failure of the sureties to justify upon the three hundred dollar bond, made an order that within a stated time after service thereof a new bond must be given with sufficient sureties, "as a condition to the maintenance of the appeal," and disobedience of the order, were held not to affect the jurisdiction of the supreme court, or to warrant a dismissal of the appeal.[6]

In Oregon it is held that an appeal is not perfected until the time has passed for excepting to the sureties; and it seems that the only way to avoid the results of a failure of the sureties to justify is to abandon the appeal and take a new one, if sufficient time remains,[7] and in Washington, it seems that an appeal is defeated by a failure of the sureties to comply with an order of court to appear and justify, if no new bond has been filed by the appellant.[8]

6 Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251.

7 See Van Auken v. Dammeier, 27 Or. 150, 40 Pac. 89; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951, following Halladay v. Elliott, 7 Or. 483. In the first case the whole subject seems to be covered by the chief justice in the opinion as follows: "The plaintiffs move to dismiss the appeal for the reason that on August 7, 1894, defendants served a notice of appeal, and on the fourteenth day of the same month filed an undertaking with one Coulter as surety. Within the time allowed by law the plaintiffs excepted to the sufficiency of the surety, and the defendants, instead of producing him for justification, abandoned the attempted appeal, and served a new notice and gave a new undertaking before the time for an appeal had expired. These facts bring the case squarely within Holladay v. Elliott, 7 Or. 483, in which it was held that an appellant may abandon an attempted appeal when he deems his notice imperfect, or when it is inconvenient or impossible for the surety to justify, in case of an exception to his sufficiency, and may give a new notice and undertaking at any time within the period limited by law for taking appeals. An appeal is not perfected until the time in which to except to the sufficiency of the surety has expired, or from the justification thereof, if excepted to, and until perfected it may be abandoned and a new appeal taken. It follows that the motion to dismiss the appeal must be overruled."

8 Starling v. Bennett, 28 Wash. 261, 68 Pac. 723; Ball. Codes & Stats., §§ 6505, 6510. In the above case the court said: "An appeal bond was filed in due time after the notice of appeal was given, to the sufficiency of the sureties upon which the defendant excepted, giving notice of a time and place at which the sureties

§ 569. Of the notice of justification—Power of court to shorten time.

Notwithstanding the positive requirement of the code that the justification must be upon five days' notice, there can be little doubt of the power of the court to shorten the time under the general provision that "in all cases the court, or a judge thereof, may prescribe a shorter time." [9]

It is much safer practice, and fairer to the adverse party, to name an hour certain. And where the notice stated that he would justify the sureties "on the 2d of November, 1857, between the hours of 10 A. M., and 5 P. M., of that day," and soon after ten the sureties appeared before the clerk, and offered to justify, but the clerk declined, because of the absence of the opposite party, to take their justification previous to the last hour designated in the notice, whereupon the sureties departed resulting in the nonapproval of the undertaking, the supreme court upheld the action of the clerk.[10]

By provisions generally found in statutes all notices must be in writing, though it was held in one case that notice in open court of the filing of exceptions to the undertaking was sufficient.[11] Such decision would not hold good where such statutes are found. At any rate notice, unless waived, is indispensable.[12]

§ 570. Of the proceeding to justify.

The existing provisions in California governing the justifica-

were required to appear before the judge of the superior court and justify as to their sufficiency. The bondsmen failed to appear at the required time, whereupon the defendants moved to strike the bond from the records. This motion the court refused to grant, but made an order, the effect of which was to grant leave to the plaintiff to file a new bond. No new bond was filed, and the defendants move in this court to dismiss the appeal. The motion must be granted. By the failure of the sureties to appear and justify, the bond became void, under the statute, and the attempted appeal, ineffectual."

[9] Cal. Code Civ. Proc., § 1005.

[10] Lower v. Knox, 10 Cal. 480.

[11] Holcomb v. Reed, 5 Idaho, 60, 46 Pac. 1019.

[12] See State v. Superior Court of Pierce County, 12 Wash. 677, 683, 42 Pac. 123; also next section.

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tion of sureties are to be found in sections 948 previously quoted and 1057 of the Code of Civil Procedure. The justification may be before a judge of the court below or a county clerk.

The appellant has the option whether he will justify the sureties before the clerk or the court; and where a justification has been had before the clerk, the court has no power to order the sureties to appear before it for a second justification.[13] The requirement of section 1057 as to the affidavit, though compliance with it be necessary, is a mere formal requirement.[14] But that does not dispense with the actual justification before the proper officer in case of the exception provided for by section 948. The proceeding to meet such exception is not specifically prescribed by the code. The usual practice, however, is for the sureties to appear or to be produced before the officer and submit to an examination touching their qualifications and sufficiency. The time within which objection may be made is thirty days after the filing of the undertaking, after which the appellant has twenty days within which to meet the objections, if any, by having the sureties to justify "upon five days' notice." Practically, he has but fifteen days within which to give the notice. But where the sureties on a bond given to stay execution pending an appeal have been excepted to by the respondent, the appellant has the full period of twenty days after such exception in which the sureties on the original bond or on a new bond may justify; and if the sureties fail to appear for justification in pursuance of one notice, and there is sufficient time left of the twenty days allowed for justification to produce the same or other sureties upon five days' notice, the appellant may give a new notice of justification, and, at the time noticed, may tender a new bond, the sureties upon which may then justify.[15]

13 Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892.

14 It seems to be an essential feature of the undertaking in Washington: Northern Counties Inv. Tr. v. Hender, 12 Wash. 559, 41 Pac. 913.

15 Brown v. Rouse, 115 Cal. 619, 47 Pac. 601. See Davelin v. Post Falls etc. Co., 4 Idaho, 735, 44 Pac. 554. Upon the facts of the first case as stated in the text the question before the supreme court being whether the appellant was entitled to a writ of supersedeas, the chief justice delivering the opinion, said: 'The re-

It was held under the Practice Act that there was no authority for a postponement of the justification until after the time limited by the statute,[16] and that decision would seem to be applicable under the present code. In McCracken v. Superior Court,[17] a principle identical with that in the earlier case was involved though the facts were somewhat different, and the decision was the same way. In the latter case, the point immediately presented was as to the power of the superior court to extend the time for the justification of sureties, and for filing a new undertaking, in case of their failure to justify on an

spondent, in resisting her application, urges three reasons for holding that the county clerk exceeded his authority in approving the bond filed on December 10th. In the first place, he says the notice was to the effect that the sureties on the original bond would justify, and the appellant had no right, in view of that notice, to file a new bond with different sureties. We think, however, that the right to do so is conferred in express terms by the statute: Code Civ. Proc., § 948. In the next place, the respondent contends that, according to the decision in Hill v. Finnigan, 54 Cal. 494, the appellant by failing to produce her sureties for justification on December 4th,. in pursuance of her first notice, thereby forfeited her right to justify them, or other sureties, at any other time. But the case of Hill v. Finnigan, supra, did not involve any such question, and it was not decided upon any principle or proposition which justifies the claim made by counsel. It was said, in effect, in the opinion in the case, that the statute contemplates but one proceeding in the trial court to stay execution, and that to allow others, after failure of the first, might enable the appellant, by a series of pretended efforts to justify, to unreasonably delay the prevailing party in the enforcement of his rights. But the 'one proceeding' contemplated by the statute, and referred to in that opinion, is the proceeding in which the appellant is allowed all of twenty days after exception to the sufficiency of his sureties to justify them, or others in their place. When that twenty days has elapsed without justification, then the proceeding is at an end, and the right to a stay is lost, so far as the trial court is concerned. But if the sureties fail to appear in pursuance of one notice, and there is sufficient time left of the twenty days allowed for justification to produce the same or other sureties, upon five days' notice the appellant may give a new notice, as was done in this case, and the respondent must attend, or the sureties will be well justified in his absence."

16 Raush v. Van Hazen, 17 Cal. 121.

17 86 Cal. 74, 24 Pac. 845.

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appeal from a justice's court and the decision was adverse to the possession of such power. But the court went extensively into the question of jurisdiction of the superior court in the matter of filing and justifying on appeal bonds, citing and approving without qualification the earlier case above cited. It was a petition to the supreme court for certiorari to review and annul the action of the superior court in extending the time for filing an undertaking on appeal from a justice's court, and in taking jurisdiction of the cause. The petitioner had recovered a judgment in the justice's court. The defendant having served and filed his notice of appeal to the superior court and also his undertaking, in proper time, but upon exception being taken to the sufficiency of the sureties, failed to have them justify pursuant to his notice of the time and place therefor. Thereafter the superior court (respondent in the petition for certiorari) made an order giving the defendant in the action before the justice thirty days' additional time within which to have the sureties justify, or to give other sureties. After the thirty days allowed by law for appealing from a judgment of a justice, the petitioner had moved in the superior court to dismiss the appeal, which motion was denied, and the defendant then permitted to give a new undertaking. It was contended by the petitioner that this action of the superior court was void as in excess of its jurisdiction. The court granted the petition and annulled the order of the superior court, adopting the view taken in a previous case, wherein the court, after reciting the statutory steps requisite to perfect an appeal from a justice's court, said: "All of these are jurisdictional prerequisites. None of them can be dispensed with, nor can any of them, if not done, be supplied, or if fatally defective, be remedied, after the time limited by the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose."[18] Thus far the opinion had but an indirect bearing upon the power of the superior court in the matter of justification of sureties in cases appealed from the superior to the supreme court. But further on, the court said: "Authority is given the supreme court to accept a new undertaking in lieu of an insufficient one in certain cases, and on certain terms, but we

[18] Coker v. Superior Court, 58 Cal. 178; Code Civ. Proc., §§ 974, 978.

know of no such statutory authority on the part of the superior court." The court here cited Hill v. Finnegan,[19] where the court said: "After a careful consideration of the different sections of the code, we are convinced that they contemplate but one proceeding to stay the execution below, and that the failure of the sureties to justify leaves the plaintiff in a position to enforce the execution of his judgment—a position the advantages of which he cannot be deprived by any further act of appellant in the court below. Otherwise, a series of pretended efforts to justify might lead to great delay in setting aside the stay, without respondent being afforded any real security for the payment of his judgment in case it should be affirmed."

The wording of the code provision governing the justification of sureties on appeals from justices' courts is somewhat different from that which governs in undertakings to stay execution on appeals from the superior court. But an inspection shows that, as regards the purpose, the one provision is little, if any, more mandatory than the other.[20]

The distinction before stated between the undertaking required to perfect an appeal, and that necessary to stay proceedings may be properly again called to mind. The latter may be given at any time, and although, as before shown, but one proceeding is provided for the justification of sureties before the lower court or clerk, yet, if, for any excusable cause, that proceeding miscarries, a new undertaking may be perfected under the immediate supervision of the supreme court.[21]

The code prescribes the method to be pursued in securing a justification of the sureties, and requires that it shall be upon notice to the adverse party. The method is of the essence of the proceeding and a justification without notice is of no avail. It was expressly so held under the Practice Act, con-

19 54 Cal. 493.

20 The provision in section 948 of the California Code of Civil Procedure is as follows: "And unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, or county clerk, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order or decree appealed from is no longer stayed."

21 See ante, § 554.

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taining substantially the same directions for the justification as those found in the code.[22]

The justification of sureties has its origin in the fear of the exceptant that the surety may not be financially able to respond, upon a breach of the obligation, and its object is to afford the adverse party an opportunity to test, by personal examination, the responsibility of the sureties. The justification itself is the proof by the surety of his adequate pecuniary ability.[23]

§ 571. With new sureties, new undertaking necessary.

Where new sureties are substituted for the original, there appears no other method by which such substitution and justification can be accomplished than by the execution of a new undertaking.[24]

It is no objection to a surety upon such new bond that he had failed to justify, pursuant to notice, after exception taken, to the prior bond.[25]

§ 572. Waiver of justification.

Like any other statutory right, that of requiring the justification after exception taken may be waived. It may be an express waiver, as where the justice refused to swear the sureties, remarking that both he and the exceptant knew them to be good, to which the latter assented;[26] or the exceptant may debar himself from asserting it under the well-settled rules of estoppel, or it may be through laches. In case of nonappearance on the part of the exceptant, the party giving the undertaking may either rest on the default as a waiver of the excep-

22 Stark v. Barrett, 15 Cal. 362.

23 See Stark v. Barrett, 10 Cal. 362; Bank of Escondido v. Superior Court, 106 Cal. 43, 39 Pac. 211.

24 See Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938; Spurlock v. Port Townsend S. R. Co., 12 Wash. 34, 40 Pac. 420.

25 State v. Superior Court of Pierce County, 12 Wash. 677, 42 Pac. 123.

26 Blair v. Hamilton, 32 Cal. 53.

tion or he may produce his sureties and take a formal approval.[27]

It appears that appearance by, and participation of, the respondent without objection at the justification of sureties upon a new undertaking substituted for one previously filed will constitute a waiver of the objection that such prior undertaking was not filed within legal time.[28] And mere formal imperfections in bonds and undertakings may be waived by a failure to object in proper form and time.[29] It was held that the sufficiency of the affidavit of a surety on an appeal bond could not be questioned for the first time in the appellate court.[30] And where the court, upon an examination of sureties, found them insufficient, it was held that it might grant leave to file a new bond without justification of the sureties.[31] No reasoning supports the decision, nor was any authority cited.

§ 573. No justification by surety company required.

The provisions of law requiring a paid capital stock in a certain amount, and official supervision with respect to the continuing solvency of guaranty and surety corporations are generally regarded as the equivalent of a justification. In Washington, a statute provides that no justification is necessary by such companies.[32] Such statutes are generally found.

27 See Bank of Escondido v. Superior Court, 106 Cal. 543, 47, 39 Pac. 211; Ballard v. Ballard, 18 N. Y. 492.

28 See Cummins v. Scott, 23 Cal. 526.

29 See Roberts v. Shelton etc. R. Co., 21 Wash. 427, 58 Pac. 576, holding that a respondent, by failing to except to a bond executed by a surety company, which did not recite that it had complied with the laws relating to the powers and duties of such companies within ten days was deemed to have waived the objection; also McEachern v. Brackett, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690, holding that an objection to the appeal bond that the surety did not state in his affidavit that his property was in the state should be taken in the superior court by exception to the sufficiency of the surety, or it will be waived.

30 Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140, Hoyt, J., dissenting.

31 Maney v. Hart, 11 Wash. 67, 39 Pac. 268.

32 1 Ball. Ann. Codes & Stats., § 1534. Held, that where an appeal bond shows on its face that the surety is a guaranty company,

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In Arizona, however, such company must justify as other sureties.[33]

§ 574. Stay pending proceeding to justify.

An important question arose in one case, and may arise at any time, as to whether execution is stayed during the period of settlement of the dispute as to the sufficiency of the sureties, or pending the substitution of a sufficient for an insufficient undertaking. The rule which may be regarded as well supported by authority is that when a stay bond with sureties is given, according to the statute, it operates a stay of proceeding without reference to its sufficiency. Such stay continues until the party giving the bond has failed, within the time allowed by the statute, to obtain a justification of the sureties or that of others in their place. If new sureties justify, their liability relates back to the time of the first stay. But, if neither the same nor new sureties justify within the statutory time, "execution of the judgment, order, or decree appealed from is no longer stayed." [34]

§ 575. Power of superior court with respect to undertakings in justices' courts.

The view taken in McCracken v. Superior Court,[35] as to the powers of the superior court with reference to permitting new undertakings to be filed appears not to accord with that held

no justification is necessary: De Boberts v. Stiles, 24 Wash. 611, 64 Pac. 795. See King v. Pony G. M. Co., 24 Mont. 470, 62 Pac. 783, holding that the fact that a surety company is insolvent does not deprive it of its power to execute an undertaking on appeal, so as to render the appeal ineffectual, in the absence of the action for making up deficiency in its assets, required by Code of Civil Procedure, section 1900, to be taken by the state auditor when its liabilities exceeded its assets, pending payment of which deficiency said section provides said company shall not be accepted on a bond.

33 McDonald v. Ellis (Ariz.), 36 Pac. 37.

34 See Chuck v. Quan Wo Chang Co., 81 Cal. 222, 228, 15 Am. St. Rep. 50, and note, 22 Pac. 594; Code Civ. Proc., § 948. See, also, Sam Yurn v. McMann, 99 Cal. 501, 34 Pac. 80, denying right of sheriff to retain property levied upon, pending justification of sureties.

35 86 Cal. 74, 24 Pac. 845.

in Gray v. Superior Court,[36] where the court treated the powers of the superior court in appeals from justices of the peace as analogous to those of the supreme court in cases appealed from the superior court, and held that the latter might permit a new undertaking to be filed in lieu of one insufficient in form. But, as authority for this, the statute of 1866[37] is now treated, both by the supreme court and practitioners as having been superseded by the code provisions.

[36] 61 Cal. 337.

[37] Stats. 1866, p. 589.

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CHAPTER 33.

RECORD ON APPEAL FROM JUDGMENT GENERALLY.

§ 576. Statutory provisions and their effect.
§ 577. The judgment-roll and other papers.
§ 578. Notice of appeal as part of record—Proof of service.

§ 576. Statutory provisions and their effect.

The record on appeal from the judgment consists of the judgment-roll and of such other papers as are designated by statute and of those only. Appeals being statutory, and the method of prosecuting them being, as has been shown in previous chapters, largely regulated by statutory and code provisions, it was not only proper and expedient, but almost necessary, in order to secure uniformity and certainty, that the record forming the basis for review of judgment and order in the appellate court should be likewise designated.

The record on appeal from judgments consists, in California, of the papers designated by code provisions, which, after various amendments, read as follows: "On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in section 661, or any bill of exceptions settled, as provided in sections 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial."[1] "On appeal from a judgment rendered on an appeal, ... the appellant must furnish the court with a copy of the notice of appeal, of

1. Cal. Code Civ. Proc., § 950.

the judgment or order appealed from, and of papers used on the hearing in the court below."[2]

Amendments were made in 1854 and in 1864. The sections were then transferred into the Code of Civil Procedure, and were again amended in 1874; but as none of the amendments were far-reaching, they need not be pointed out in detail, to do which would impart little or no information without elaborating at some length the slight legal consequences of each of several changes in mere phraseology. This would involve the discussion of provisions which have been superseded, and of numerous decisions which have no direct bearing in cases arising upon existing provisions. The larger proportion of the decisions prior to the last amendment are still authoritative, however, on most points arising in the practice, owing to the trivial scope of the amendments.

The first, and most important, rule deducible directly from the presence of a complete statutory designation of the papers constituting the record on appeal, is that the court, not only need not, but cannot, consider any other record than that so designated by the statute; nor can it examine or consider any addition, or attempted addition, thereto. This rule has been declared, enforced and explained in a vast number of decisions, covering every state where statutory appeals are provided for.[3]

§ 577. The judgment-roll and other papers.

The most important constituent of the record is the judgment-roll. The papers constituting it are, in California, specified in the following provision, directing how it shall be made up: "Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll: 1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons,

[2] Cal. Code Civ. Proc., § 951.

[3] See post, § 671 et seq.

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must also be included; 2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to the change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant must also be added to the other papers mentioned in this subdivision; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included."[4] Upon comparing sections 670 and 950 of the code, a slight incongruity or inconsistency is disclosed. The former, in designating the papers which shall be added, mentions bills of exceptions, but omits mention of any statement of the case, while the latter still retains the statement of the case among those to be furnished on appeal. One result of this omission is that a statement of the case, such as was formerly used in the practice, cannot become part of the judgment-roll, though it may still be carried to the appellate court as part of the record.[5]

4 Cal. Code Civ. Proc., § 670. The following held no part of judgment-roll; bill of particulars: Edelman v. McDonnell, 116 Cal. 210, 58 Pac. 528. Affidavit and order for publication of summons: People v. Thomas, 101 Cal. 571, 36 Pac. 9; La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765. A motion to strike out parts of a pleading and order thereon: Sutton v. Stephen, 101 Cal. 545, 36 Pac. 106: an order setting aside a default and judgment and restoring an answer to the files: Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; finding of referee when not upon whole issue: Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021; appearance of attorney: Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026; stipulation: San Francisco Sav. Union v. Meyers, 76 Cal. 624, 18 Pac. 686.

Property in Judgment-roll—Disposition of demurrer: Maricopa County v. Rosson (Ariz.), 40 Pac. 314; Reynolds v. Jackson County, 33 Or. 422, 53 Pac. 1072; order substituting party: Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55. Proof of service of summons, where defendant has defaulted: Barney v. Vigouveaux, 75 Cal. 376, 17 Pac. 433; pleading though striken retains its place in judgment-roll: Greggs v. Groesbeck, 11 Utah, 310, 40 Pac. 202; Reddington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

5 Craig v. Fry, 68 Cal. 363, 9 Pac. 550; People v. Crane, 60 Cal. 279. In the second case, the court said: "The code makes no pro-

In Montana, under the Code of Civil Procedure of 1895, the instructions, both those given and refused, become part of the judgment-roll.[6] Instructions are also part of the judgment-roll in Utah.[7] In California, "the charges given or refused, and the indorsements thereon," in criminal cases are made part of the judgment-roll.[8]

Additional to the judgment-roll, which constitutes the record on appeal from the judgment, is the notice of appeal. "Any bill of exceptions or statement in the case upon which the appellant relies," would appear to be superfluous, as to bills of exceptions, since the section also designates the judgment-roll, and section 670 directs, among the papers to be attached to and to form part of the judgment-roll, "all bills of exceptions taken and filed."

From this incongruity, which has existed from an early date, resulted the habit of the courts, as well as the profession, of speaking of the judgment-roll in a narrower sense than as including the bill of exceptions.

But section 950 mentions, in addition to "any bill of exceptions or statement in the case, upon which the appellant relies," another statement—namely, "any statement on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court," etc. The section almost fully explains itself. The bill of exceptions and statement are given separate attention elsewhere.[9]

Questions arising on the pleadings are considered in connection with the scope of review in the appellate court, and inci-

vision for the settlement of a 'statement on appeal.' It provides for the settlement of a 'statement of the case.' But that cannot be settled until after a notice of a motion for a new trial has been served. Such statement, when settled, may be used on the motion for a new trial, and afterward on an appeal, if one be taken, from the judgment.''

6 Mont. Code Civ. Proc., § 1080; Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 Pac. 9. Previously they were not unless in bill exceptions: Sanderson v. Billings, 19 Mont. 236, 47.

7 Utah Rev. Stats., § 3151; Utah Optical Co. v. Keith, 18 Utah, 464, 56 Pac. 155.

8 Cal. Pen. Code, § 1207.

9 See chapter 22.

STANFORD LAW LIBRARY

dentally in many other chapters. For the general laws and principles governing pleadings, otherwise than as above indicated, reference must be had to treatises on that subject. The same course must, owing to the limitations of this work, be pursued with reference to judgments. But more or less explanatory reference has also been made to judgments in many preceding and subsequent parts. Verdicts, findings, and bills of exceptions will each be discussed in separate chapters, following this in the order here named.

§ 578. Notice of appeal as part of record—Proof of service.

The first paper mentioned is the notice of appeal, the office, nature and uses of which have been already considered. Nothing is said anywhere in the code as to proof of service of the notice of appeal; nor is there any rule of the supreme court on the subject.[10] Still, the service being a jurisdictional matter, it would appear to be of equal importance with any other matter that the proof of service should appear in the record, and this is, and always has been recognized in practice. A peculiarity about it is that it has no legal sanction for being in the record, and yet its presence there is tolerated, and not only so, but its absence may furnish occasion for objection, which will be seriously considered in the appellate court. The objection, if supported by the showing in the record, may be met, however, according to recent decisions, by procuring proof of service of the notice and filing the same, duly certified by the proper county clerk, in the supreme court. The authorities go even further and sanction the furnishing of proof of service by affidavit filed in the appellate court in answer to such objection.[11]

10 It is no part of judgment-roll: Peck v. Agnew, 126 Cal. 607, 59 Pac. 125. In this case the court said: "The further ground urged for a dismissal of the appeal, viz., that the notice of appeal has not been served upon the respondents, is contradicted by the transcript, in which there is printed a copy of an affidavit of this service. The correctness of the affidavit, as printed in the transcript, is not disputed, and from the nature of the act proof of such service would not be a part of the judgment-roll. The objection to the statement therein that a 'copy' of the notice of appeal rather than the original was served upon the respondents is without merit."

11 See post, §§ 539, 648, 650, 665.

CHAPTER 34.

THE VERDICT.

§ 579. Statutory changes.
§ 580. General and special verdicts distinguished.
§ 581. Inconsistency between general and special verdict.
§ 582. Verdicts in equity cases.
§ 583. Correction of verdict by the court.
§ 584. Verdict must be within the issues.
§ 585. Uncertain, informal and defective verdicts—Amendment of.
§ 586. Waiver.

§ 579. Statutory changes.

The verdict in cases tried by jury can no more be dispensed with as part of the judgment-roll, and hence of the record on appeal, than can findings in cases tried by the court without a jury. Yet, prior to 1862, the verdict was not mentioned among the papers which constituted the judgment-roll. But, during the same period, although the statute required express findings, these were no part of the judgment-roll, nor was there any express provision designating either as part of the record on appeal. The necessity for their presence in the record was so obvious, however, that each, in its proper place, was uniformly brought up and by common consent treated as properly a part of the record. Neither could be properly embodied in the statement on appeal then in use, because the statement was, as construed by the court, designed to contain and present only such matters as were not of record in the lower court.[1]

§ 580. General and special verdicts distinguished.

With respect to form, verdicts are of two kinds—general and special. They are defined and distinguished by a California code provision as follows: "The verdict of a jury is either gen-

[1] Reynolds v. Harris, 8 Cal. 618.

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eral or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." [2]

The power of the jury to render a special verdict is not general or optional with the jury. The cases in which a special verdict may be rendered are designated as follows: "In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a special verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." [3]

All verdicts must be entered in the minutes; [4] but it is specially provided that a special verdict shall be "filed with the clerk and entered upon the minutes;" [5] from which it is inferable that it must be in writing. It is also a reasonable conclusion

2 Cal. Code Civ. Proc., § 624.

3 Cal. Code Civ. Proc., § 625. It is not an abuse of discretion to refuse to submit special interrogations in a cause where the issues are not complicated: Giffen v. Lewiston (City of) (Idaho), 35 Pac. 545. In New Mexico juries make special findings when required: Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306, holding that compiled Laws, 1897, section 3993, was not repealed by the Code of Civil Procedure passed in 1897. In Oregon it is provided that the court may in all cases instruct the jury to find on a particular question of fact submitted in writing, if they return a general verdict. This was construed to mean a question of an ultimate fact: White v. White, 34 Or. 141, 50 Pac. 801, 55 Pac. 645; Hill's Ann. Laws Or., § 215. In Utah the submission of special findings to a jury is within the discretion of the trial court and a refusal to submit them is not error: Genter v. Conglomerate Min. Co., 23 Utah, 165, 64 Pac. 362.

4 Cal. Code Civ. Proc., § 628.

5 Cal. Code Civ. Proc., § 625.

upon comparison of the two sections that a general verdict may be returned orally.[6]

§ 581. Inconsistency between general and special verdict.

With respect to the form and scope of special verdicts, the same rule applies as to findings. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them."[7]

It is further provided as follows: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."[8] This simply embodies the rule previously established and followed by the courts. It was declared in Leese v. Clark,[9] and assumed to be so well understood as not to require the citation of authority.

But it seems that in case of such inconsistency, in order to warrant the rendition of judgment upon the special verdict, rather than upon the general verdict, the special issues submitted must constitute all the material issues in the case. Thus where, in an action to recover the damages for an alleged diversion of water claimed by the plaintiff, several of the issues were specially submitted to the jury, but one material issue, abandonment, was not so submitted, whereupon they returned a general verdict for the defendant and a special verdict upon the issues submitted in favor of the plaintiff, the court held that the court properly entered judgment upon the general verdict. It was contended that the judgment so rendered was in violation of the provision of the Practice Act identical with the code provision above quoted. But the court

6 A general finding of the issues in favor of the defendant sufficiently supports a judgment in his favor, not based on any affirmative matter in his answer: Main v. Main (Ariz.), 60 Pac. 888.

7 Cal. Code Civ. Proc., § 624. See Breeze v. Doyle, 19 Cal. 102, 105.

8 Cal. Code Civ. Proc., § 625.

9 20 Cal. 387, 426, cited to same effect in Little Rock etc. Co. v. Miles, 40 Ark. 327, where the judgment was directed to be entered thereon: Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564.

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said, with reference to this contention:[10] "It would undoubtedly be so, if the special verdict had been upon all the issues in the case; but none of these special findings are upon the issue of abandonment; and if the jury founded their general verdict in favor of the defendant upon that one issue alone, the special verdict is not 'inconsistent' with the general verdict. A special verdict upon a single point may often determine the whole case, either for the defendant or plaintiff; and in such case the special verdict would control any general verdict to the contrary. But where the special findings do not have such controlling effect—if they do not include issues which, if found for the defendant, would sustain a general verdict in his favor—the special verdict cannot properly be deemed 'inconsistent with the general verdict.' This was probably the view taken by the court below in rendering the judgment." If such be the true construction, it is difficult to see any good reason for ever submitting special issues to a jury in any case where a general verdict is also required. If, in order to be of any avail, all the issues must be specially submitted, either they must all be inconsistent with the general verdict in order to overturn it, or all be consistent with it in order to support it.

If, in case of a submission of all the issues specially, the verdict upon them is materially conflicting, all the issues having been so submitted, it is just as if no verdict at all had been returned, it constitutes a mistrial, and necessitates a retrial.[11]

Perhaps it is in part owing to these absurd consequences, and the superior convenience of submitting the issues generally, that the practice of directing special verdicts has been so nearly abandoned. It was matter of common knowledge, when the practice of directing special verdicts was much in vogue, that often the jury would disagree upon special issues, but found no trouble in reaching a general verdict; and sometimes counsel would waive a verdict upon such special issues and agree that the jury might return a general verdict. An

10 McDermott v. Higby, 23 Cal. 489. See, also, Ogg v. Shehan, 17 Neb. 324, 22 N. W. 556.

11 See ante, § 9.

instance of this is found in Mitchell v. Hackett,[12] where the court said: "It is very remarkable, when we consider the question submitted, that they could not agree upon the special issues, but did agree upon a general verdict. But counsel, before the verdict was announced upon the statement of the jury that they could not agree upon the special issues, consented to receive the general verdict, and there was no error in this."

The verdict in the above case was not, however, sufficient to support the judgment, because the code cannot be construed otherwise than to require all the issues to be submitted to the jury, even where a special verdict may be required, except in equity cases; and, had counsel taken advantage of the point, the party against whom that verdict was rendered should have secured a new trial, or a venire de novo.[13] The closing part of the section before quoted provides that "those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." In other words, the special verdict—that is, all its parts taken together—must be as comprehensive as a general verdict.

§ 582. Verdicts in equity cases.

What are called special, or advisory, verdicts in equity cases, though frequently resorted to, are of but little legal consequence. The provisions which, as before shown, require that a special verdict must cover all the issues which might be covered by a general verdict, cannot be construed as applying to equity cases, for the reason that there is no constitutional or statutory provision to be found which either requires or forbids a resort to jury trial in cases tried on the equity side of the court. Strenuous efforts have been made and able arguments advanced, from time to time, in support of the proposition that courts submitting issues to juries in equity cases should be as much bound by the verdict as in law cases. But the absurdity of that position, if not apparent from what was just stated, is disclosed by reflecting that, since the court must ultimately find the facts, as well as apply the proper equitable

12 25 Cal. 539, 545, 85 Am. Dec. 151.

13 For distinction between new trial and venire de novo, see ante, § 12.

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principles, and is alone responsible for the final conclusion in equity, it is of no consequence whether it call to its assistance a jury, a referee or any other agency.

There is nothing in the assertion of the power of the judge sitting as a chancellor, under the modern system of consolidation of jurisdictions, inconsistent with the well-established doctrine that a code system of practice such as that of California, governs, generally, cases in equity as well as actions at law, or which supports the earlier view of the courts that the Practice Act was not intended to apply to cases calling for the exercise of equitable jurisdiction. The earlier cases established the doctrine that a special verdict of the jury was merely advisory to the court, as a component of the general view above stated, but the doctrine has survived the overthrow of the general view, which was first repudiated in Gagliardo v. Hoberlin,[14] and has never since been given binding recognition by the courts. In the case just mentioned, the court said: "The legislature intended that the rules of practice should have a uniform operation, and that intention is so expressed as to leave no room for misapprehension. It is the duty of the courts to administer these rules in accordance with the design of the legislature, and any inquiry into the nature of the action is irrelevant and inadmissible. All actions are placed upon the same footing, and the courts have no authority to create distinctions not recognized by the statute. The exercise of such authority cannot be vindicated, and under proper circumstances we shall never hesitate to apply the necessary corrective. . . . . The case at bar is eminently a proper one in which to place ourselves right upon this subject."

Upon the feature of the former chancery practice which has survived the leveling or equalizing effect of code systems—namely, the advisory theory of special verdicts—there are many exemplifications, recent and comparatively recent, in which the exercise of the power of trial judges to accept or reject such verdicts has been accepted without question. In Free-

14 18 Cal. 395. In Duff v. Fisher, 15 Cal. 375, and Riddle v. Baker, 13 Cal. 295, the court had already held that the provisions for new trials were alike applicable to both clases of cases.

man v. Stephenson,[15] and in Stockman v. Riverside L. & I. Co.,[16] the court found upon the facts differently from the findings of fact returned by the jury, and rendered judgment upon its own findings. In the latter case the court said: "The cause was then proceeded with, and after being argued and submitted to the court for decision, the court made and filed findings of fact and conclusions of law; and it is insisted, on behalf of the appellants, that, as the findings of the court upon some of the material issues are contrary to the findings of the jury upon the same issues, this court should, notwithstanding a substantial conflict of evidence upon those issues, proceed to weigh the evidence, and decide whether it preponderates in favor of the findings of the court or of the jury. To this we cannot assent. The findings of fact by the court are as conclusive here as they would be if no jury had been impaneled in the case. The question for us is, whether there is sufficient evidence to sustain the findings of the court upon the material issues; and a substantial conflict in the evidence upon such issues is sufficient to sustain a finding either way upon them. It has often been held here that the verdict of a jury in an equity case is but advisory to the court, and in this case it appears to have been the understanding between the parties that it was to be regarded in that light only."

In Roberts v. Sabin,[17] though approving the principle of Stockman v. Riverside etc. Co., it was held that the verdict of a jury in an equity case, where all the issues were submitted to it, and the court made no findings whatever, should be the basis of the judgment; and the judgment, being contrary to the verdict, was reversed and remanded, with a direction to the lower court to enter a new judgment in accordance with the verdict. But where, as in California, findings are required to be filed in all cases tried by the court, the Washington case could not be accepted as authority.[18]

The verdict, whether general or special, must correspond to and be within the issues. If it be entirely outside the issues, or any part of it outside be inseparable from any part within

[15] 63 Cal. 499.

[16] 64 Cal. 57, 28 Pac. 116.

[17] 14 Wash. 35, 38, 44 Pac. 108.

[18] See post, § 588 et seq.

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the issues, it must, if not corrected by the court, be disregarded, and usually necessitates a retrial, if the trial was of a legal action. And where the action was against indorsers to recover the amount due for the principal and interest of a promissory note, and the answer merely denied the presentation of the note to the maker, the demand for payment, refusal to pay, and notice of presentation, demand and refusal, and the jury returned a verdict for the plaintiff in a sum considerably less than the principal and interest, shown by the face of the note, the court reversed the judgment entered on the verdict, saying: "The jury had nothing to do with matters not in issue, and a verdict referring to such matters is, so far, surplusage. So far as the verdict related to matters in issue, it was in favor of plaintiff. The court should have computed the amount due on the note for principal and interest, and rendered judgment accordingly." [19]

If a part of the verdict be outside the issues, and yet be easily separable from the balance, the verdict will neither be set aside nor disregarded in toto, but the excess will be rejected, and judgment rendered on the balance, if the balance be sufficient to sustain a judgment, and no violence is thereby done to the obvious intention of the jury. Accordingly, where the verdict found for the plaintiff the amount demanded in the complaint payable in "gold coin," but nothing was said in the complaint as to the kind of money in which payment was due, it was held that the lower court should have rejected the surplusage, and it was directed to do so, and enter judgment according to the prayer of the complaint. The court said: "It is true section 664 of the Code of Civil Procedure requires the judgment to conform to the verdict; but if the verdict goes beyond the issues raised by the pleadings, and passes upon an extraneous fact not embraced therein, it is void pro tanto, and the surplus matter may be disregarded in entering the judgment." [20]

§ 583. Correction of verdict by the court.

It was held in an early case that the court may amend the

19 Pierce v. Schaden, 62 Cal. 283, 285.

20 Watson v. San Francisco & H. B. R. R. Co., 50 Cal. 524.

verdict so as to correct mere defects of form, even after entry of judgment.[21] But provision is made by the code for the correction of "informal and insufficient" verdicts "by the jury under the advice of the court."[22] There is good reason for saying that this should be held an exclusive statutory method, and would preclude any alteration whatever by the court. But it may be considered as well settled otherwise. The correction of obvious mistakes in verdicts by courts have frequently been upheld. But when, upon the hearing of the defendant's motion for new trial, the court decides that the judgment for plaintiff is too great, it is not proper procedure to order it modified upon consent of the plaintiff, but the court should cause the plaintiff to enter a remittitur of the excess, when denying the new trial.[23]

There is no necessity for sending the jury out for further consideration on account of mere surplusage, without which sufficient remains to support a judgment. In such case the court may render judgment and ignore the excess.[24] And it was held that a new trial should be granted for irregularity of the court where, on account of mere surplusage in the verdict, the court unnecessarily sent the jury out to further consider, and they returned a materially different verdict.[25]

§ 584. Verdict must be within the issues.

In such instances as those above mentioned, the correction can be made in entering the judgment, without sending out the jury again.[26] But if the verdict be uncertain or self-contradictory to such extent that it cannot be determined what issues

21 Perkins v. Wilson, 3 Cal. 137.

22 Cal. Code Civ. Proc., § 619. Same rule in North Dakota: State v. Maloney, 7 N. Dak. 127, 72 N. W. 927.

23 Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395.

24 Marquand v. Wheeler, 52 Cal. 443, also holding that if in such case the jury be sent out and they return with a different verdict a new trial will be granted: See, also, Hancock v. Butler, 18 Mo. App. 465, to effect that surplusage in verdict may be disregarded.

25 Marquand v. Wheeler, 52 Cal. 445.

26 Chamberlin v. Vance, 51 Cal. 85.

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actually raised by the pleadings they intended to decide, or how they intended to decide the issues submitted to them, they should be retired to their room to further consider their verdict, under the court's instructions. "When the verdict is announced, if it is informal, or insufficient, in not covering the issues submitted, it may be corrected by the jury, under the advice of the court, or the jury may be again sent out."[27]

If a verdict, uncertain to the extent above described, be received, and entered upon the minutes, it will not support a judgment, at least not as against direct attack upon appeal.[28] An instructive opinion was that pronounced in Fiore v. Ladd,[29] by Justice Bean, construing the Oregon statute, being similar to that of California and other states, wherein they define the powers of courts over verdicts. The facts sufficiently appear in the part of the opinion here quoted, as follows: "The form of verdict as prepared and submitted to the jury was for one thousand and seventy dollars, the principal sum and interest, but the jury deliberately erased that amount, and of their own motion placed the sum at eight hundred dollars, and rendered their verdict accordingly. This verdict was received and filed without objection, and the jury discharged. It was therefore beyond the power of the court to add to or take from the amount as found by them. It is perhaps within the power of the court to amend a verdict so as to make it conform to the real intention of the jury, but certainly a judge cannot, in the exercise of such power, usurp the functions of a jury, or substitute his verdict or judgment for theirs. . . . . This case affords an illustration of the importance of such a rule. The jury were able to agree on a verdict for eight hundred dollars, probably as a compromise, but it is manifest that they were unwilling to render one which included interest, but by the act of the court in amending the verdict this purpose and intention of the jury has been wholly disregarded, and they have been made unwillingly to agree to a verdict which they in the first instance expressly refused to assent to. What the result of the trial would have been had the court instructed the jury

27 Cal. Code Civ. Proc., § 619.

28 Watson v. Damon, 54 Cal. 279.

29 29 Or. 528, 532, 46 Pac. 144.

that they must allow interest in case they found in favor of plaintiff no one can tell, and therefore the verdict as rendered is practically the act of the court." The court very properly held that the only remedy for the party aggrieved by such a verdict, if adhered to after advice by the court, was to move for a new trial.[30]

§ 585. Uncertain, informal and defective verdicts—Amendment of.

But an uncertain verdict is also clearly distinguishable from one wherein the jury fails to pass upon all the issues submitted to it, as in the case of findings similarly defective the aggrieved party should resort to his motion for a new trial.[31]

But unlike the Oregon case above noticed, a verdict may be so uncertain that unless the jury be again sent out, the verdict will not support a judgment; and unless the court, of its own motion, sets it aside and grants a new trial, the party aggrieved, usually the plaintiff, is entitled to a new trial, on the ground of irregularity of the court in entering the insufficient verdict, unless he has waived his right by not objecting in proper time.[32] Thus, in Dougherty v. Haggin,[33] the plaintiff claiming to be entitled to the use of certain waters of a certain stream, brought his action for (among other relief) damages. The verdict returned was in these words: "We, the jury, find that the plaintiff is entitled to forty inches, miner's measurement, of the waters of Clear creek, described in the complaint; and we further find that he has been damaged by the defendants in the sum of twelve hundred dollars." Judgment was entered for the plaintiff, pursuant to that verdict. The defendants moved for a new trial, which was denied, and then appealed from the judgment and order. The supreme court, in reversing the order, remanding the cause for a new trial, and advising an amendment of the complaint, said: "The complaint avers that the

[30] See ante, § 78.

[31] See ante, §§ 250-254.

[32] See ante, §§ 53, 78, 254.

[33] 56 Cal. 522. See, also, Stewart v. Taylor, 68 Cal. 5, 7, 8 Pac. 605; Kelly v. McKebben, 54 Cal. 192; Riverside Water Co. v. Sargeant, 112 Cal. 233, 44 Pac. 560.

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plaintiff is entitled to 'five hundred inches, measured under a four-inch pressure of the waters' in controversy, but nowhere makes any reference to 'miners' measurements.' It was admitted at the argument that these latter terms have no fixed meaning, and that an inch of water according to 'miners' measurements' in one locality is sometimes a very different quantity from an inch according to 'miners' measurements' in another locality. As already observed, the pleadings make no reference to such measurement, nor is there anything anywhere in the record to indicate what is meant by the 'forty inches, miners' measurement, of the waters,' awarded by the jury and the court below to the plaintiff. For aught that the record shows, and for aught that we know, the quantity thus awarded him may exceed the 'five hundred inches, measured under a four-inch pressure,' claimed in his complaint. It was suggested by counsel for the respondent that the words 'miners' measurements' used by the jury in its verdict, and by the court in its decree, might be treated as surplusage, and disregarded, and the verdict and decree read as giving to the plaintiff 'forty inches, measured under a four-inch pressure.' It is clear that we cannot thus alter the language and intent of the court and the jury."

But though a verdict may be uncertain to such an extent as to necessitate a reversal where the judgment is assailed on appeal, or a new trial, if that proceeding for a review be applied for, it may still support the judgment as against collateral attack. In other words, a judgment entered upon an uncertain verdict is not necessarily void.[34]

If the verdict and the pleadings, taken together, the verdict is seen to respond to the issue, so that the maxim "Id certum est quod reddi potest" applies, the judgment will stand as against collateral attack.[35]

34 See Stewart v. Taylor, 68 Cal. 5; 8 Pac. 605, where the court held the judgment erroneous because founded upon an informal and incomplete verdict. See, also, Goelick v. Bower, 6[illegible] Cal. 65; Vanderford v. Foster, 62 Cal. 179.

35 Herteluinran v. Superior Court, 61 Cal. 119. See, also, James v. Wilson, 7 Tex. 232; Jackson v. Jackson, 47 Ga. 99; Lincoln v. Lincoln, 12 Gray, 45. In the first case the court said: "The record shows that there was no issue between the parties as to the execu

§ 586. Waiver.

The doctrines of waiver and estoppel have a more or less extensive application in the discussion of defective and informal verdicts. But there is an important distinction herein between an express waiver of imperfections and imputable waiver. There is no limit to which imperfections may not be expressly waived, if the verdict be not so uncertain as to fall short of constituting a decision of any of the issues. In such case the party's act is construed to constitute a withdrawal of the other issues from the consideration of the court. In a case of this kind the court said: "If the plaintiff has objected to the verdict on the ground that it did not pass upon all the issues, and the court had refused to require the jury to render a verdict upon all the issues, it would undoubtedly have been set aside. But the plaintiffs consented to accept it, and the verdict as accepted finds in favor of the defendants upon their claim, without passing upon the other points at all, certainly not in favor of the plaintiffs. The acceptance of the verdict was a substantial withdrawal from their consideration of all that portion of the lode claimed by plaintiffs which was not found to belong to defendants, and it does not appear but that the defendants recovered all claimed by them. The verdict appears to us to be in favor of the defendants." [36]

tion, terms, or amount of the promissory note—these were all admitted; but it was pleaded in avoidance that 'the note was made by the defendant without consideration, the same having been executed in accordance with and to carry out an alleged agreement' between the maker and payee of the note. The issue therefore was, and the only one, whether the note had been given for an unlawful purpose. Upon that the jury found for the plaintiff. The verdict responded to the issue; and it was sufficiently certain to serve as a basis for the judgment to which the plaintiff was entitled. . . . . Taken together, the record and verdict showed the exact sum which the jury meant to find for the plaintiff, and the judgment which was entered under those circumstances is not void: James v. Wilson, 7 Tex. 232; Jackson v. Jackson, 47 Ga. 99; Lincoln v. Lincoln, 12 Gray, 45. Having jurisdiction, any error committed by the court in the exercise of its jurisdiction is not reviewable by certiorari: Chase v. Christianson, 41 Cal. 253; Yenawine v. Richter, 43 Cal. 312."

[36] Gonzales v. Leon, 31 Cal. 99.

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A party is not, as a rule, debarred on the ground of waiver from proceeding directly for relief against a verdict so uncertain or contradictory that it does not, as a matter of law support a judgment; and in such case it is not required that the record on appeal or on motion for new trial should show that he objected at the time of the rendition of the verdict.[37] It is otherwise with respect to mere informalities in verdicts; and it is well settled that the presence of a party having a right to object to mere defects of form, and his failure to object constitutes a waiver thereof.[38]

37 Campbell v. Jones, 38 Cal. 507, 509, 510. In this case, Crocket J., in a concurring opinion said: "The verdict is too informal to support a judgment in this form of action; and the judgment itself is plainly erroneous in omitting to specify the property of which restitution is to be made. . . . . In its present form, the judgment for restriction could not be enforced by any process known to the law."

38 Sexey v. Adkison, 40 Cal. 408, 418; Algier v. Steamer Maria, Cal. 170.

CHAPTER 35.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

§ 587. Comparison of trial by court alone and trial by court and jury.
§ 588. Statutory provisions and changes—Systems of express and of implied findings distinguished.
§ 589. When findings implied under present system.
§ 590. Presumption of waiver of findings.
§ 591. Findings must respond to and dispose of the issues.
§ 592. Question may be presented as well on appeal from order on motion for new trial as on appeal from the judgment.
§ 593. The findings should be sufficiently definite and certain as not to require an investigation on review to determine what issues are decided.
§ 594. Finding upon an immaterial issue not required.
§ 595. Ultimate, rather than probative, facts should be found.
§ 596. Findings must be within the issues when compared with the pleadings.
§ 597. Findings should not be of legal conclusions, or of conclusions of mixed law and fact.
§ 598. Findings should not set forth the evidence.
§ 599. The mere misplacement of a finding of fact among the conclusions of law does not affect its character as a finding.
§ 600. How facts to be stated.
§ 601. Findings must not be contradictory.
§ 602. When findings of probative facts disregarded.
§ 603. Construction of findings.
§ 604. Agreed statement in lieu of findings.
§ 605. Findings by referee.
§ 606. Findings must be filed in proper time.
§ 607. Power of court over findings in case of mistake, misapprehension, etc.
§ 608. Power of court to amend findings.
§ 609. No findings required to support orders.
§ 610. How conclusions of law stated.
§ 611. Changing conclusions of law.

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§ 587. Comparison of trial by court alone and trial by court and jury.

A large proportion of cases which at common law would have required the presence of a jury are now tried by judges of the courts in the absence of juries.

Varied are the provisions for waiving the constitutional right to a jury trial in civil cases. But it is unnecessary here to enter upon a discussion of such provisions.

The theory of the common-law was that, in all cases except equitable, the facts should be passed upon by a jury, under the advice of the court. Under that system a verdict was a mixed conclusion of law and fact. The court had power to advise the jury on the facts and to direct them on questions of law. Under the constitutional and statutory systems of California and of other states, as previously shown,[1] the court still directs (instructs) the jury as to the law; but the power to advise them in matters of fact is taken away. Except for this modification of the common-law plan, the relation of the court and jury is substantially the same as formerly.

When in the trial of an action under the existing system the jury is dispensed with, and the court assumes the province of both court and jury, the line of demarkation between the decision on facts and that on the law is still retained. The trial in this form is sometimes described as by the court without a jury; otherwise, by the court sitting as a jury. It is submitted that the latter expression best describes the situation. The court sitting as a jury returns its verdict on the issues of fact, and, separately, but in this instance, as a court, draws the conclusions of law, just as it does upon the return of a special verdict by a jury.

The return, or making of findings, required of the court corresponds exactly with the findings or answer to interrogatories where a special verdict is required of a jury; and an instance of a court trying a case without a jury may well be described as a court sitting in a dual capacity, first, as a jury, trying the issues of fact, the court being ever present and inseparable, with advice and instruction; and, secondly, as a court to pronounce particular conclusions of law, and the general conclusion, in the form of a judgment.

1 See ante, § 303 et seq.

§ 588. Statutory provisions and changes—Systems of express and of implied findings distinguished.

The system of express findings in all actions tried without a jury was first tried in California and then abandoned for that of implied findings. Following a trial of the latter system, the former was restored, thus demonstrating its advantages, by experimental tests.

By the Practice Act of 1851[2] it was provided that in giving the decision upon the trial of issues of fact by the court "the facts found and the conclusions at law shall be separately stated," and that judgment upon the decision should be entered accordingly. In 1861 a system was instituted by a separate act, not incorporated at first into the Practice Act, which became known as the system of implied findings, being held in connection with the provision of the Practice Act above noticed to have abolished the prior system.[3]

In 1866 the provisions of the separate act were embodied by amendment in the Practice Act.[4] That statutory régime continued until the adoption of the Code of Civil Procedure in 1872, when the system of express findings was restored substantially as it had existed between 1851 and 1861. During said period of so-called implied findings, the absence of findings from the record was no cause for reversal of any judgment unless it was also disclosed that there were proper and timely request therefor, refusals and exceptions. This former California system is now in operation in Washington where the party desiring to except has five days in which to do so after service of the same upon him, when signed subsequently to the hearing and in his absence.[5] But findings are not there required in equity cases.[6]

2 Laws 1851, p. 78.

3 See Cook v. De la Guerra, 24 Cal. 238, 242; McKeon v. McDermott, 22 Cal. 668, 83 Am. Dec. 86.

4 See Laws 1865-66, § 180, p. 844.

5 Ball. Ann. Codes & Stats., § 5052. Exceptions to findings held not to have been invalid merely because noted on the day after the findings were signed, there being nothing in the record to indicate that they were not in fact taken at the time the findings were made: Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332.

6 Ball. Ann. Codes & Stats., § 5029; Knowles v. Rogers, 27 Wash. 211, 67 Pac. 572. In this case the court said: "It is argued by

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A party not satisfied with findings must specifically except to such designated parts as he objects to. And exceptions taken in open court, stating that each and every finding of fact is excepted to, followed by a statement of counsel, after the findings are numbered, that he desires to renew his objections to the findings, specifying them by number, is sufficiently specific to comply with the statute.[7]

appellant in this court: First, that this is a law action, and that findings of fact by the court were necessary, under section 5029, Ballinger's Code: Bard v. Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; and Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030. It is true, the action was brought as a law action, and that there was a general denial in the answer which raised questions of fact proper for a jury. There appears to have been no demand for a jury, but the parties seem, without objection, to have submitted the cause to the court for trial without a jury. There was also an equitable defense interposed, and the cause was tried solely upon this defense. There was no attempt to dispute the record title to the land, or that the legal title of record was in the appellant. The whole controversy was tried upon the amended answer and reply. The court seems to have heard all the evidence relating to the transaction, and to have considered the reply amended to conform to the proof, and determined that the appellant had, in fraud of respondent's rights, obtained title to the land, and adjudged appellant's title to be held in trust for respondent. As tried, the action was purely equitable. This court has repeatedly held that section 5029 of Ballinger's Code has no application to equitable actions: Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490."

7 Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773; 2 Ball. Ann. Codes & Stats., § 5052. In the above case the following taken from the opinion follows a complete statement of the record as it appeared in the transcript on appeal: "The statute (Ball. Code, § 5052) provides that when a party excepts he shall specify the part or parts excepted to, and the judge shall note the same in the margin or at the foot of the report or decision. It appears from the order of September 4, 1900, that exceptions to the findings and decree were taken by appellants in open court at the time the findings of fact were signed and that they were taken down and noted by the stenographer, who reported this case, by order of the judge, but by oversight they were not attached to the findings or filed; and the nunc pro tunc order of September 4, 1900, was for the purpose of filing them and attaching them to the findings, as of the date of the findings, as the act of the court. This order was to complete the record according to the facts, and to supply an omission arising from the act of the court, and was clearly within the power of the

The same system, to a limited extent, is in operation in Montana. The Montana statute, requiring exceptions for defects

court. When this record was supplied, the appellants, under section 6513 of Ballinger's Code, had the right to bring it to this court, by way of a supplementary record, at any time prior to the hearing of the appeal. The respondent insists that no specific exceptions were taken to the findings of fact, because the language used was, 'I desire to renew now my objection to the findings of fact numbers,' etc. We think that the word 'objection,' taken in contact with the context, was equivalent to the word 'exception' and that the 'objection' of the respondent is hypercritical. There was an exception to each finding of fact and each conclusion of law. This court has held that an exception in general language to all the findings of fact and conclusions of law is insufficient, but it has never gone to the extent of holding that exceptions to the facts by number as in this case, fall within that rule. When such exceptions are taken, the statute has been complied with": See, also, Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332. The following from Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421, affords additional light upon the rule of the supreme court with reference to findings: "Respondent moves the court to strike from the record and files the brief of the appellants, on the ground that the findings of fact and conclusions of law requested by appellants are not printed in the brief of the appellants; and the respondent further moves the court that, on granting the motion to strike the brief, the appeal be dismissed. The respondent further moves the court that the judgment of the lower court be affirmed, for the reason that the exceptions of appellants to findings of fact and conclusions of law do not specifically point out the findings complained of as erroneous. Subdivision 5 of rule 8, provides that in all equity causes and actions at law tried by the court without a jury the party appealing shall print in his brief the findings of fact, with the exceptions thereto, etc., and also such findings as the lower court was requested to make, with the refusal and exceptions in case any error or contention shall be based thereon. The opening brief of the appellants fails to comply with subdivision 5 of rule 8. The reply brief, however complies with the same. This provision of the rule is for the benefit of the court. No injury can result to the respondent from failure to comply with it. Respondent is advised by the record in the case and assignment of errors as to the points that will be urged on the appeal for a reversal. The printing of the findings, etc., in the reply brief cures the omission. The last ground urged is not well taken. At the time of signing the findings, the record shows that the appellants took exceptions in the following form and manner, which were allowed by the court: 'The defendant in open court at the time the court signed the foregoing

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in findings, relates only to exceptions for deficiencies or omissions, and not for what is contained in the findings.[8]

In Oregon findings in equity cases appear to be of but little importance. In deciding an equity case it is the duty of the supreme court of that state to reach its conclusions by original investigation, and the findings of the trial court are only advisory, though they may be persuasive.[9]

findings, except to each and every part of each and every of the foregoing findings of fact and conclusions of law, that is to say: To the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth findings to the first, and second conclusions of law—which exceptions, and each of them, are allowed, and entered in the record in this action.' This was sufficient, under the rule laid down by this court in Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773.''

8 Cobban v. Hecklen (Mont.), 70 Pac. 805.

9 Hill's Ann. Laws Or., § 543; Larch Mountain Inv. Co. v. Garbade, 41 Or. 123, 68 Pac. 6; Nessley v. Ladd, 29 Or. 354, 45 Pac. 904. In the first of these cases the court said there was nothing in Willis v. Smith, 36 Or. 601, or Browning v. Lewis, 39 Or. 11, 64 Pac. 304, in conflict with the rule thus declared. In Nessley v. Ladd, supra, Justice Wolverton, delivering the opinion, went into the question of the proper effect given to findings in that court very fully, and cited and explained prior decisions. The first portion of the opinion given below sets forth the divergent views of counsel showing that neither side had formed correct views of the proper practice, and is as follows: ''Before proceeding to a discussion of the facts, we will determine a controversy which has arisen touching the practice of courts of equity involving the effect to be given to the reports of referees empowered to make findings of fact and law, and to such findings by the lower courts. The respondent contends, as expressed in the brief of his counsel, that 'the findings of a referee, in an equity case, based upon conflicting testimony, where the truth can only be arrived at by weighing the evidence and considering the credibility of the witnesses, will not be disturbed by an appellate court. This is especially true, where the referee is a lawyer of good standing, selected by the judge on account of his ability and fitness for the position, and he attends personally upon the taking of the testimony, and observes the manner and conduct of the witnesses while upon the stand, and his findings have been approved by the lower court'; while the appellant's counsel contend that the rule is not so broad, and state it thus: 'It has been a standing rule of action declared by this court that findings of fact made by a referee will not be disturbed where there is evidence to support them, but this means only that where the court is in doubt

The provision of the Code of Civil Procedure of California as first adopted has not been changed, and reads thus: "In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must

as to the determination of a controverted proposition of fact, the question will be referred to the conclusion of the referee, whose superior advantages, arising from the testimony having been given in his presence, will be allowed to go in solution of the doubt.' The question involved has been alluded to a number of times in the decisions of this court, but it seems apt to have been so well settled as to exclude a divergence of opinion among able counsel as to what rule has been adopted." After reviewing the statutory provisions and prior decisions on the subject he proceeded: "It will be noted that in each of these latter cases this court has carefully gone through and weighed all the evidence. Indeed, it is the constant habit of the court in equity cases, though arduous and oftentimes burdensome, to carefully read and consider all the testimony accompanying the transcript, and without special reference to the findings of the referee of the court below. The statutory requirement is that the 'suit shall be tried anew upon the transcript and the evidence accompanying it,' and the court has in every instance of which we have any knowledge followed the direction of the statute in that respect. But it sometimes transpires that evidence is adduced for and against a contested proposition of apparently equal weight, when read from the depositions, as it must be here, or the evidence touching the same is very conflicting and unsatisfactory, as where one witness affirms and another of seemingly equal credit flatly denies, in such cases the findings of the referee and the court below have been considered of material value, where they have had the opportunity of seeing the witnesses, hearing them testify, and marking their demeanor while on the witness-stand, and were thereby the better enabled to determine whether the witness was speaking the truth or not, and as to which were entitled to the greater credit. The findings of the referee may be considered as only advisory to the court below, and, unless excepted to, will ordinarily be affirmed without question; and as the legislature has required the court below to make and file its finding upon which to base the decree, they were probably intended as advisory to this court, which may affirm, modify, or reject them in toto, as the testimony may warrant. But it is the primary duty of this court to try the case anew—that is, entire, upon the transcript and the evidence accompanying it; and it is only for the purpose of resolving a doubt which may arise from the conflicting and contradictory nature of the evidence that the findings of the referee or the court below are resorted to and become of value, and then it may be said to be a cogent argument that because of the su-

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be entered accordingly."[10] In enforcing this section the construction adopted by the court during the life of the identical section of the act of 1851 has been uniformly adopted; hence the decisions during that period are authoritative, while many of those rendered during the above mentioned era of implied findings are not. But principles analogous to those applied to the statute as it then stood have been often applied to cases arising under the present system. Hence it becomes necessary to explain in a general way the intermediate system and to sometimes refer to the decisions rendered thereunder.

Never, during the intermediate period of what is commonly termed implied findings, was the entry of the decision of the

perior advantages accorded them they are more likely to be right that this court could be if their findings should be entirely discarded. The process is somewhat analogous to the practice which prevails in the federal courts of sending doubtful questions of fact to a jury, to inform the conscience of the chancellor, but the verdict is not binding upon the judgment of the court. It is simply advisory, and the court may disregard it entirely, or adopt it either partially or wholly. 'The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others': Basey v. Gallagher, 87 U. S. (20 Wall.) 670; Kohn v. McNulta, 147 U. S. 240, 13 Sup. Ct. Rep. 298; Gorsed v. Beall, 92 U. S. 695." The foregoing lengthy quotations have been given because the views and suggestions contained therein are applicable in other states having a similar practice and appellate system as that of Oregon. This case was followed in Larch Mountain Inv. Co. v. Garbade, supra, where the court said: "It is argued that the plaintiff's remedy is at law, and not in equity, and that the findings of the trial court on conflicting testimony should not be disturbed on appeal. No objection to the jurisdiction was made in the court below, but, on the contrary, the defendants answered, asking affirmative relief, and so waived that question: Kitcherside v. Meyers, 10 Or. 21; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004. Municipal Sec. Co. v. Baker County, 33 Or. 338, 54 Pac. 174. The effect to be given to the findings of the trial court on an appeal from a decree was considered, and the true doctrine announced, in Nessley v. Ladd, 29 Or. 354, 45 Pac. 904."

10 Cal. Code Civ. Proc., § 633. Section 632 often has an important bearing upon cases which turn upon the construction of section 633. It reads as follows: "Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision."

court upon the minutes dispensed with; nor was there anything which forbade the court preparing and filing findings without a request therefor. The theory upon which it rested was that inasmuch as the judgment would be presumed to be warranted by the facts unless the contrary appeared, the prevailing party had no occasion to require findings, and that in the absence of a request therefor, the losing party might well be presumed to have waived findings. This latter branch of the theory underlying that system has entered somewhat into the present, as will be presently shown. A leading feature of the system was that, if, upon the submission of the cause, the losing party had not made a request for findings and had his request entered upon the minutes, he, by such neglect, lost, his right to require findings, and could not subsequently, upon the decision being rendered, require findings, or object that there were none.[11] The inconvenience of this is obvious, The request had usually to be made at a stage when it was impossible to know which would be the losing party. And if that opportunity was lost, and the court nevertheless filed findings of its own motion, he could not object to omissions or defects therein. Thus in Hurlburt v. Jones[12] the court said: "The findings are objected to as defective. They are so, and perhaps to a greater extent than the appellant claims. The facts as found are, with some exceptions, secondary and not final—mere matters of circumstantial evidence rather than facts entering as terms into propositions of law. But no exception was taken to the findings as defective, as required by the act of 1861. Strictly, the case should, perhaps, be treated as a case without a finding, and without exception taken for the want of it; and under that aspect, we must presume that the court found from the testimony all the facts essential to the defense."

But having laid the foundation by his request in proper form, a party was in a position to except to findings filed in response thereto, upon any available grounds. He could not, however, take advantage of any omissions or defects without

11 San Jose (City of) v. Shaw, 45 Cal. 178.

12 25 Cal. 226, 230. See, also, Green v. Clark, 31 Cal. 592; James v. Williams, 31 Cal. 213; Jenkins v. Fink, 30 Cal. 586, 595, 89 Am. Dec. 134.

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prosecuting his exceptions, and pointing them out.[13] That was not, however, the time nor occasion for suggesting the insufficiency of the evidence to support the findings.[14] He did not, however, have cast upon him by the statute, or by his request, any burden with reference to the scope or nature of the finding. The responsibility rested entirely upon the court.

The party was not required nor was it the proper practice for him, in addition to objecting, to suggest how the amendment should be made, or omission supplied. In Hidden v. Jordan[15] the court said: "A party is entitled to a finding, and he is also entitled to have a finding upon every issue raised, which is essential to the determination of the case. If the judge neglects to file his decision in writing, stating the facts found, and his conclusions of law, or if he omits to find upon any issue essential to the determination of the case the party desiring a finding may except for the want of a finding in the former case, or for a defect in the latter; but when he excepts for defects, the 'particular defects shall be specifically and particularly designated'—that is to say, he must specify, particularly, the point or issue upon which he requires the court to state the fact found, but he is not authorized to dictate how the court shall find."

The record thus made up was reviewed according to established principles. If the court failed to file any findings whatever after proper request, there was no alternative but to reverse the decision on appeal, that being an irregularity essentially prejudicial.[16]

But if findings being filed the requesting and losing party pointed out omissions or defects, and no amendments were made, or none such as requested, an investigation of the points thus presented for rview became necessary to determine whether the matters complained of constituted prejudicial error.[17]

13 Miller v. Steen, 30 Cal. 403, 89 Am. Dec. 124, and note.

14 Hathaway v. Ryan, 35 Cal. 187, 191; Rice v. Inskeep, 34 Cal. 224, 226; Hidden v. Jordan, 28 Cal. 302, 305.

15 28 Cal. 302, 305. See, also, Miller v. Steen, 30 Cal. 403.

16 Cruess v. Fessler, 39 Cal. 337.

17 See Polhemus v. Carpenter, 42 Cal. 386; Logan v. Hale, 42 Cal. 645, 649, where the court said: "The court also erred in refusing to amend its findings on the request of the plaintiff. The findings, as

Under the operation of the general presumption which obtains in favor of the support of the judgment by the facts, in case of the absence of findings, and of a request therefor, there could be no review of the question whether the judgment was supported by the evidence without a motion for a new trial, unless without a request the court made findings which were so inconsistent with the judgment as not to support it upon any conceivable state of facts established by the evidence. Where, however, the latter was the case, as where the findings ended with the statement that "the foregoing are all the facts of the case," and were insufficient to support the judgment, it was held that no facts not found could be implied.[18]

The only important difference between the system of implied findings and the existing, usually distinguished from the former by designating it as one of express findings, consists in the fact that neither party is now under any obligation to prefer any request, or to make any suggestion whatever on the subject of findings, but may rest the matter where the law leaves it in the hands of the court.

§ 589. When findings implied under present system.

Although implied findings as a system are done away with, yet the doctrine still survives to a limited extent, and is occasionally given force. Thus, where findings are waived, a general finding of an ultimate fact must be implied in support of the judgment, which will control and overrule specific allegations of evidentiary matters. Nor is any averment of probative matter of any effect to qualify the ultimate fact thus established.[19] Such a finding, being within the issues and logically

filed, omitted to find upon several of the material issues in the cause, and the court should have supplied the omission when its attention was called to the subject by the plaintiff's exceptions to the findings.

18 Schwartz v. Skinner, 47 Cal. 1.

19 See Rankin v. Newman, 107 Cal. 602, 608, 40 Pac. 1042. The facts, explanations and authorities found in the following from the opinion in this case are all instructive. "On the issue thus made up the judgment was for the defendant, and, the evidence not being before us, the judgment conclusively establishes, for purposes of this appeal (and with the qualification hereafter stated), that defendants have accounted and have paid over as the law directs. It is the con-

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necessary to support the judgment, is, there being no express finding, conclusively presumed.[20]

tention of the plaintiff, however, as we understand this argument, that despite the issue made on the ultimate fact of accounting and settlement, and the finding thereon to be implied from the judgment, the allegations of the defendant's answer how the settlement was brought about, the inventory taken, and the mode adopted of valuing the several classes of assets, the estimate of liabilities, the construction placed by the defendants and the executor on the articles of copartnership, and the influence of such construction on the settlement reached, do yet demonstrate that the adjustment made was wholly vicious and to be treated as null. But, assuming, without at all intimating any opinion on the subject, that those averments justify the inference that the executor and the defendants adopted a false basis and pursued a wrong method in their endeavor to 'settle the affairs of the partnership,' so that the result should be disregarded, it is yet apparent that they are merely matters of evidence, improperly injected into the pleading, upon which the court was required to find (Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675), and which neither add to nor detract from the effect of the denials that the business and affairs of the partnership remain unsettled, and that defendants have failed to account: Botto v. Vandament, 67 Cal. 332, 7 Pac. 753, and cases cited. If the court had made the single express finding that 'the defendants had accounted to said estate for the interest therefor in said partnership, and have paid over all balances payable to the executor in right of said decedent and the business of said partnership of John Levinson, William J. Newman, and Benj. Newman and the affairs thereof have been settled and closed,' it would have been responsive to the paramount issues made by the pleadings and, barring the exception below noted, would unquestionably sustain the judgment; it would show that the whole purpose of the action had been already accomplished. But such a finding being within the issues, and logically necessary to support the judgment, is, there being no express finding, conclusively implied (Utter v. Eames, 59 Cal. 5; Wixson v. Devine, 80 Cal. 387, 22 Pac. 224; Blanc v. Paymaster Min. Co., 95 Cal. 525; 29 Am. St. Rep. 149, 30 Pac. 765); and no finding or averment of probative matter—mere items in the sum of the evidence from which the trial court drew its final conclusion—is of any effect to qualify the ultimate fact thus established. 'The rule has long been settled that, when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the finding of the ultimate fact': Gill v. Driver, 90 Cal. 74, 27 Pac. 64; Smith v. Acker, 52 Cal. 217. 'It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for new trial and statement of

§ 590. Presumption of waiver of findings.

The advantages of the system of express findings, if there be any, are in a great degree, nullified by a presumption indulged by the appellate court that the parties waived findings, unless the record affirmatively shows the contrary; and in order to show the contrary, a bill of exceptions, statement, or other appropriate method whereby the record presents the question, is required.[21]

In California, where this view first obtained, but one attempt has been made to explain or to present reasons for this extension of the doctrine of presumption and construction of the statutes, and that was in Mulcahy v. Glazier,[22] where it was first asserted. There the court said: "It is a well settled rule that upon appeal taken error is not to be presumed, but must be affirmatively shown. Where, therefore, as here, a cause is tried by the court, without a jury, and the appeal is taken upon the judgment-roll, the mere nonappearance of findings of fact in the roll does not necessarily establish that error was committed. The statute, when its several provisions are considered together, does not absolutely or unconditionally require that findings of fact shall be filed, but only that they must be filed unless waived in some one or more of the three methods therein mentioned.

evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts, which have no proper place in the findings': Pico v. Cuyas, 47 Cal. 178."

20 Rankin v. Newman, 107 Cal. 602, 608, 40 Pac. 1024. See, also, Utter v. Eames, 59 Cal. 5; Wixson v. Devine, 80 Cal. 387, 22 Pac. 224; Blane v. Paymaster etc. Co., 95 Cal. 525, 29 Am. St. Rep. 149, 30 Pac. 765.

21 Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Mulcahy v. Glazier, 51 Cal. 626; Reynolds v. Brumagin, 54 Cal. 254; Glenn v. Arnold, 56 Cal. 631; Gordon v. Donahue, 79 Cal. 502, 21 Pac. 970; Tomlinson v. Ayres, 117 Cal. 568, 570, 49 Pac. 717; Lount v. Lount, 1 Ariz. 425, 25 Pac. 798; Garr v. Spaulding, 2 N. Dak. 419, 51 N. W. 867; Chandler v. Kennedy, 8 S. Dak. 59, 65 N. W. 439; Haynes v. Roberts, 4 Utah, 406, 11 Pac. 512. In actions tried under the provisions of section 5630 of the Revised Codes of North Dakota, findings of fact could not be waived by counsel: Nichols v. Stangler, 7 N. Dak. 107, 72 N. W. 1089.

22 51 Cal. 626.

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Under the rule of presumption referred to, we cannot presume that no such waiver occurred; the necessary intendment, in support of the judgment, is the other way. A party, therefore, who comes here to say that the court below committed an error in failing to find the facts, must, by bill of exceptions or some other similar and appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below, otherwise the intendment here must go to support, and not to overthrow, the judgment rendered there." The statutes so construed are sections 632, 633, and 634 of the Code of Civil Procedure. The first requires that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." Section 633 requires that "in giving the decision the facts found and the conclusions of law must be separately stated," and "judgment upon the decision must be entered accordingly." Section 634 provides that "findings of fact may be waived by the several parties to an issue of fact: 1. By failing to appear at the trial; 2. By consent in writing, filed with the clerk; 3. By oral consent in open court, entered in the minutes." It will be observed from the opinion in the leading case that the doctrine is grounded solely upon presumption. It is not claimed that there is any essential connection between the section prescribing how the findings may be waived and the other provisions; and indeed such a view would be palpably untenable. Sections 632 and 633 are mandatory and are obviously in pari materia. The first says that the decision must be in writing, filed with the clerk, and the second prescribes what must be the form of the decision, and that the judgment upon that decision must be entered accordingly. That is to say, no judgment can be entered except on a written decision filed with the clerk, and consisting of findings of fact and conclusions of law. And by another section,[23] that decision becomes part of the judgment-roll; so that when a record is presented to the appellate court, from which findings are absent there, are the presumptions of official duty on the part of the clerk, and that the record speaks truly, to offset the asserted presumption that the parties did an affirmative act. To show

23 Cal. Code Civ. Proc., § 670.

the contrary they are required to present something containing recitals of a negative, of no higher authority than that given by the certificate of the judge—a negative already established by the judgment-roll, importing absolute verity. Then there is the presumption that a party in court is there to insist upon all his rights, and not to waive them, which continues until the contrary appears.[24] But the doctrine is so well established that any attempt to overthrow it would be a waste of effort. In keeping with it, however, it could be as consistently held that where the record shows that the trial was by a jury, but no verdict appears in the record, the parties are presumed to have waived a verdict and submitted to the court's decision without a trial.

The codifiers were not willing to leave it to be established by evidence of less dignity than the files or minutes of the court that findings are waived. If they had intended that it might rest upon a presumption, probably section 634 would have been omitted. It would seem that if the court omits findings where the law requires them, and they are not waived, it is prejudicial to the party in whose favor the invalid judgment reads, and he should move for a new trial on the ground of irregularity of the court, or appeal. Either party should also be permitted to have it set aside on motion as inadvertently entered, and an opportunity thus afforded to the court to make and file findings. The prevailing theory entails the same mischiefs which resulted from the system of implied findings which it was the main purpose of the change to one of express findings to escape.

The irregularity is vital, however, upon being made apparent, by the method above indicted.[25] Nor will the presumption be indulged in face of a showing made by the record, otherwise than by bill of exceptions, that findings were not waived. Thus, where the defendant set up new defensive matter in the answer, and the only finding was by way of mere recital, "the court finds all the facts as stated in the complaint," the court held no presumption of a waiver of findings on the defenses could be indulged in, in the face of that record.[26]

24 Borkheim v. North Brittish etc. Co., 30 Cal. 623.

25 Haffenegger v. Bruce, 54 Cal. 417; Estate of Burton, 63 Cal. 37; Van Court v. Winterson, 61 Cal. 615.

26 People v. Forbes, 51 Cal. 628. To same effect, Hardenberg v.

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The effect of making the request, and excepting to defective findings filed in response thereto, as well as the proper practice thereupon, was thus clearly and concisely stated in Pohlhemus v. Carpenter.[27] "If the defendant had not requested written findings, there would have been no obligation on the court to file them; and on being notified of the oral decision, the defendant would have had no other resource than to proceed with his motion for a new trial upon the lights then before him, and would have had no cause of complaint on that ground, if the court had never filed written findings. But having requested them, he was entitled to have them before being compelled to proceed with his motion. If the court had refused to file them, the defendant would have had a certain and sufficient remedy in an appeal from the judgment, without being put to the necessity of a motion for a new trial. But when the findings were filed it was competent for the defendant then to inaugurate his motion for a new trial within the statutory time."

§ 591. Findings must respond to and dispose of the issues.

The findings must respond to and cover all material issues raised by the pleadings. And no findings which are necessary to support the judgment, and which do not appear, are implied. Very similar principles govern here as in the case of special verdicts.[28]

The above is the broadest and most important rule on this subject.[29] The decisions were the same under the Practice Act

Hardenberg, 54 Cal. 592, reversing judgment for failure to find on material issues raised by answer: Gull River etc. Co. v. School Dist. 1 N. Dak. 509, 48 N. W. 427.

27 42 Cal. 475, 486.

28 See ante, §§ 581, 585.

29 Campbell v. Buckman, 49 Cal. 362, 367; Northern Pac. R. R. Co. v. Reynolds, 50 Cal. 90, 93; Kennedy v. Berry, 52 Cal. 87; Watson v. Cornell, 52 Cal. 91; Swift v. Canavan, 52 Cal. 417; Della v. Bohall, 53 Cal. 709; Paulson v. Nunan, 54 Cal. 375; Earnst v. Cummings, 55 Cal. 179, 183; Freeman v. Campbell, 55 Cal. 197; Knight v. Roche, 56 Cal. 15, 25; Everson v. Mayhew, 57 Cal. 144; Robinson v. Pittsburg R. R. Co., 57 Cal. 417; Lang v. Specht, 62 Cal. 145; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Joslyn v. Smith, 2 N. Dak. 53, 49 N. W. 382; Roblin v. Palmer, 9 S. Dak. 36, 67 N. W. 949; Taylor v. Vandenberg, 15 S. Dak. 480, 90 N. W. 142; Wright v. Ramp, 41 Or.

prior to the era of implied findings.[30] And this rule holds good whether any evidence was introduced upon the issue or not. Thus where a material issue was whether the plaintiff or the defendant received a majority of the votes cast at an election, and there was no finding thereon the court said: "The court below wholly omitted to find upon this issue, and if the fact be that no evidence on this point was introduced, either by the plaintiff or defendant, this does not excuse the want of a finding. It is the duty of the trial court to find upon all the material issues made by the pleadings, whether evidence be introduced or not, and if there be no finding on a material issue, the judgment cannot be supported."[31] Nor is a statement that no evi-

285, 68 Pac. 731, holding findings necessary in all actions at law tried by the court; Wilson v. Wilson (Idaho), 57 Pac. 708. In the first case cited above, the court, after pointing out a material question of fact upon which there had been no finding said: "No express finding is made by the court below upon this question of fact, and the trial having occurred since the taking effect of the code, no finding can be implied in support of the judgment. The statement inserted among the findings of fact, to the effect that no evidence upon this point was given by either party, cannot, under the code, be accepted as a virtual finding in the negative. Besides, the very facts set forth in the other findings tend in some degree at least, to support a contrary conclusion. The evidence upon this point, such as it was, should have been weighed by the court below, and the question of fact determined." In Gould v. Stafford, supra, the court said: "The judgment will have to be reversed because the findings are insufficient. They are not pointed and specific on the issues presented; some of them are contradictory of each other, and some of them are in conflict with the admissions of the pleadings." In Wright v. Ramp, supra, the court said: "The first question is, perhaps, concluded by the findings, since the court found that it was not possible to deliver and set up the monument prior to the time the same was received at Salem. But there is no finding as to whether the monument was of the kind and quality called for by the contract. . . . . There is no finding that the monument was of the kind called for by the contract, or that it was such a one as the defendant was bound to receive and accept, and, until that question is determined in favor of the plaintiff, he is not entitled to recover as for a breach of the contract."

30 See Russell v. Amador, 2 Cal. 303; Semple v. Burkey, 2 Cal. 321; Estell v. Chenery, 3 Cal. 468; Davis v. Caldwell, 12 Cal. 125; McKeon v. McDermott, 22 Cal. 667, 83 Am. Dec. 86.

31 Speegle v. Leese, 51 Cal. 415.

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dence was introduced upon an issue equivalent to a finding upon it.[32] If there be no evidence on an issue, then, since the burden of proof is upon the party holding the affirmation on such issue, there should be a finding against him.[33] And it is immaterial whether the issue arise upon allegations in the complaint, and denial in the answer, or upon an affirmative defense, pleaded in the answer, and treated as denied by the plaintiff.[34] Thus in Billings v. Everett[35] the court said: "The answer sets

32 Campbell v. Buckman, 49 Cal. 362, 367; Golson v. Dunlap, 73 Cal. 161, 14 Pac. 576; Vanderslice v. Matthews, 79 Cal. 278, 21 Pac. 748.

33 Golson v. Dunlap, 73 Cal. 161, 14 Pac. 576; Vanderslice v. Matthews, 79 Cal. 278, 21 Pac. 748. In the first case the court said: "One of the important elements of this inquiry is as to the adequacy of the consideration. Was there adequacy of consideration? This question is presented in the record in distinct outlines. The complaint alleges that the odds and ends of land aggregated in value the sum of forty-seven thousand and eight dollars, of which the share of the devisees was thirty-nine thousand, two hundred and seventy-three dollars. The court made no finding upon this issue, but simply stated that there was no evidence 'from which the court is able to find the actual value of the residue of the estate at the time of the conveyance.' This cannot operate as a finding: Speegle v. Leese, 51 Cal. 415; Campbell v. Buckman, 49 Cal. 367. If no evidence was introduced, the court should have found the fact against the parties upon whom was the burden of proof, or in other words, in accordance with the presumption, which in this instance was against the defendants." In the second case the court said: "The court found against the allegation set up as new matter in the answer—i. e., that the articles left with Mr. Taylor during his lifetime were lost or stolen without fault or negligence, etc. That was proper; there was no testimony proving the allegation, and the court was right in finding against the defendant upon the issue thus made."

34 Swift v. Canavan, 52 Cal. 417. In this case the court said: "The affirmative matter set up in the answer of the defendant, if true, constituted a valid defense to the action, and it was the duty of the court below to find upon the issues thus presented. Among these issues was the question whether, at the time of the alleged grievances, before and after that time, the city and county of San Francisco was the owner, and seised and possessed of the locus in quo, and whether the plaintiff and his family occupied the premises by the permission of and as the servants and employees of said city and county, and not otherwise. On these material issues the findings are silent, and until they are disposed of, no judgment could be properly pronounced."

35 52 Cal. 661, 663. To same effect, Byrnes v. Claffey, 54 Cal. 155.

up as a defense an oral agreement made by the defendant with the Clear Lake Waterworks at the time when the note in suit was executed, to the effect that the note should not be paid unless the canal was constructed and completed across the lands of the defendant so that one thousand acres of his land could be irrigated therefrom, before the maturity of the note, and that the water company has failed to complete the canal in accordance with this agreement. If this averment be true, the consideration of the note has failed in whole or in part, and as the plaintiff took the note after maturity, the defense is available as against the note in his hands. The court below failed to find on this material issue raised by the answer, and no judgment could be properly rendered until there was a finding on that point."

And where the answer specifically denies a material allegation of the complaint, there must be a finding upon that issue, else the findings will not support the judgment, as where the defendant specifically denied some of the allegations of a complaint on a contract, and, among others, that in regard to the consideration, and the court failed to find upon that issue.[36] And where the defendants, in an action upon a bond, attached to a building contract, in their answer denied that the plaintiff properly defended the actions brought to foreclose the liens of materialmen, and also denied that they had any notice of the pendency of certain actions, the court said: "These denials of allegations in the complaint constitute issues upon which the court below did not find. The issues were material, and should have been passed upon."[37] And where the court, after making findings in favor of the plaintiff as to all the allegations of his complaint, disposed of all the affirmative allegations in the answer by saying that they "are untrue except only in so far as the same accord with the foregoing facts," the supreme court said: "The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found; as it is, we are not informed which of the allegations of the answer were in the opinion of the court below true, which untrue. We cannot

[36] Kennedy v. Berry, 52 Cal. 87. To same effect, Le Clert v. Oullahan, 52 Cal. 253.

[37] Earnst v. Cummings, 55 Cal. 179, 183.

STANFORD LAW LIBRARY

assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found."[38]

The issues upon which findings are required are only such as arise upon the pleadings. It was held in one case that findings were necessary where issues of fact were involved in a motion.[39] But the decision has been entirely ignored in practice and cannot be considered as of any authoritative value or importance.

It is but another expression of the general rule to say that, in order to support a judgment, the findings must be upon the cause of action made by the complaint, and not upon facts which, though they might have entitled the party to some relief if properly pleaded, yet constitute a ground for recovery different from that alleged. Thus where the issue was whether the money with which land was purchased was, in part, a trust fund and the court found that the plaintiff and another "were partners in the purchase'" and "were equally interested therein as owners" of the land, the court, reversing and remanding the cause said: "The point in issue was not whether they were 'partners in the purchase,' nor whether they were equally interested in the land as owners, but whether the plaintiff's money had paid for one-half of it. If they were merely partners in the purchase, and in that or some other method had become equally interested in the land as owners, the legal title being in Chateauneuf, and it not appearing that the plaintiff had advanced any part of the purchase money, very different questions might arise from those presented by the complaint. In other words, the cause of action, if any, established by the findings, is wholly different from that averred in the complaint, and is foreign to any issue raised by the pleadings. The rule is well settled that a plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."[40]

In several cases following the adoption of the Code of Civil Procedure, the supreme court adopted the practice, in cases

38 Harlan v. Ely, 55 Cal. 340, 344.

39 Semple v. Burkey, 2 Cal. 321.

40 Mondran v. Goux, 51 Cal. 151.

where there was a failure to find upon a material issue, of directing the lower court court to find upon the omitted issue instead of ordering a new trial.[41] But the directions of the court are not always uniform. In Freeman v. Campbell,[42] the judgment was reversed and the cause remanded for such application for amendment of the proceedings as the parties might be advised was for their interest.

It will be observed that neither section 632 nor 633 makes any discrimination between the cases of failure to appear at the trial, and of failure to answer. The former is specified as a waiver by section 634; and, where the party fails to enter an appearance by answer or otherwise, he waives, not only findings, but a trial,[43] and admits the allegations of the complaint. In other words, there are no issues of fact to be found.

Upon the same principle, where a fact is admitted by the pleadings a finding in accordance with the admission is unnecessary.[44] And not only so, but a finding contrary thereto will be disregarded.[45] The same is true when the judgment rests upon an issue of law alone, as where it is rendered on a motion for nonsuit,[46] or for judgment on the pleadings.[47]

§ 592. Question may be presented as well on appeal from order on motion for new trial as on appeal from the judgment.

As has been previously shown, a failure to find upon a material issue is ground for a new trial.[48] And in many of the preceding illustrations the defect of a failure to find was pre-

41 See Watson v. Cornell, 52 Cal. 91; Le Clert v. Oullahan, 52 Cal. 252; Swift v. Canavan, 52 Cal. 417; Billings v. Everett, 52 Cal. 661; Phipps v. Harlan, 53 Cal. 87.

42 55 Cal. 197.

43 Hutchings v. Castle, 48 Cal. 156; Shroeder v. Jahns, 27 Cal. 281; Call v. Association, 3 S. Dak. 272, 52 N. W. 1086.

44 Swift v. Mugridge, 8 Cal. 445; Anderson v. Alseth, 8 S. Dak. 240, 66 N. W. 320; Parker v. Bank, 3 S. Dak. 87, 54 N. W. 313.

45 Burnett v. Stearns, 33 Cal. 473; Tracy v. Craig, 55 Cal. 93; Bradbury v. Cronise, 46 Cal. 289.

46 Gilson Q. M. Co. v. Gilson, 47 Cal. 600; Reynolds v. Brumagin, 54 Cal. 254.

47 Taylor v. Palmer, 31 Cal. 242.

48 See ante, § 253.

STANFORD LAW LIBRARY

sented upon appeal from the judgment. So it is seen that the form of presentation for review is immaterial. In Elliott v. Peak,[49] the point was presented on appeal from an order granting a new trial to the defendant, who had moved therefor on the ground of the failure of the court to find upon an issue as to the date when a claim was presented, that being material in determining whether or not it was barred by the statute of limitations. The order was affirmed.

§ 593. The findings should be sufficiently definite and certain as not to require an investigation on review to determine what issues are decided.

The above is the nearest rule generally applicable, with reference to certainty and definiteness, of which the nature of the case admits. In Johnson v. Squires[50] the only finding in the record which could be in any way construed to dispose of an affirmative defense was one in the words, "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the plaintiffs, and against said defendant." The court, in reversing the judgment, said: "The findings of fact do not, in terms, dispose of the issues tendered by this affirmative defense, and they remain undisposed of unless by the fifth finding. This finding is as follows: 'That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the plaintiffs, and against said defendants.' We do not think this finding sufficient. To say that all the issues of fact raised by the pleadings are found and decided in favor of either party, suggests an inquiry as to what issues are raised by the pleadings—a question often found to be one of no little difficulty to determine, and concerning which, in this case, the views of the court below may be widely different from our own. We think the finding under consideration as indefinite in its character as the finding that 'all the material allegations of the complaint' are resolved in favor of a named one or other of the parties, and which we have held insufficient as a finding of fact."

49 53 Cal. 84.

50 53 Cal. 37.

While all the material issues must be disposed of in the findings, it is not necessary that any particular order should be observed, or that the language of the pleadings should be followed. The finding need not be directly and pointedly made that each of the several allegations of the complaint or answer is, or is not, true. If the court finds such facts as will be sufficient with the facts admitted by the parties to be true to necessarily determine every material issue in the cause, the requirement of the law in that respect will be satisfied.[51] In Harlan v. Ely,[52] the court said: "A finding that all the 'material' averments of a pleading are true or untrue is insufficient." But the defect in the findings in that case and which caused a reversal was more serious than that indicated by this expression of the court, and it may be treated as dicta, the cases cited by the court not being in point. At any rate, both subsequent and previous decisions, appear to have fully established the sufficiency of finding in the general form above given, where no affirmative defenses are alleged in the answer. In the latter case it has become well settled that a finding that all the allegations in the complaint are true and all those in the answer untrue is sufficient.[53] In Davis v. Drew,[54] the trial court, after making certain findings against the plaintiff, proceeded thus: "4. And all and singular the allegations, contained in paragraphs 1, 2, 3, and 4 of defendant's answer are true; 5. And all and singular the allega-

[51] Schroeder v. Jahns, 27 Cal. 274, 282. For a technically correct rule, see Hihn v. Peck, 30 Cal. 286.

[52] 55 Cal. 340, 344, citing Ladd v. Durkin, 51 Cal. 277, and Johnson v. Squires, 53 Cal. 37.

[53] See McEwen v. Johnson, 7 Cal. 258, 261, where the finding was simply that the facts stated in the pleadings, complaint and answer, were respectively true and untrue, was held sufficient; Pralus v. Pacific G. & S. Min. Co., 35 Cal. 34, 35; Williams v. Hill, 54 Cal. 393; Carey v. Brown, 58 Cal. 184. In Williams v. Hill, supra, the court said: "The objection that the findings do not support the judgment, in that the court did not find as to the alleged mistake, is fully answered by the finding of the court 'that all the facts set forth in the complaint are true'; and by the fourth finding. The facts set forth in the complaint (transcript, folios 9 to 11), are entirely inconsistent with the mistake alleged in the answer. If the allegations of the complaint are true, there could be no such mistake."

[54] 58 Cal. 152, 156.

STANFORD LAW LIBRARY

tions contained in paragraph 5 of the defendant's answer are true." The supreme court seemed not entirely satisfied with the form of the findings but considered that it was bound by precedent to hold the findings sufficient, saying: "This mode of finding facts, by reference to the answer, or portions of it, is not to be commended. It imposes great labor in this court, both on counsel and court. But our predecessors have accepted such findings as proper and sufficient, and therefore we do not feel disposed to adopt a different course."

The question of whether a finding is sufficiently specific or too general, may sometimes be answered by reference to the character of the issue. If an issue be tendered in general terms and met by a denial in the same form, a finding in the same general form will be sufficient; but where the pleadings are so framed that the controversy turns upon a particular fact, the finding should conform to the issue thus presented, and be specific.[55] Accordingly, where only general facts were averred in the complaint and answer, and the controversy related to the settlement of a long-standing account consisting of numerous items, it was held that a general finding of a balance in favor of the plaintiff was sufficient.[56] But a finding which in addition to a mere reference to the pleadings requires a further investigation or comparison between pleadings, or parts thereof to determine its meaning is not sufficiently certain and definite. Thus, where the court found "that all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue," the court held it insufficient and reversed the judgment, for that reason.[57] And a general finding by reference to a pleading which contains an adjective prefix to the phrase "facts stated in the complaint," having the effect to qualify it, and render it uncertain as to what the court intended to find, is insufficient. Thus where the finding was that all the "material" facts stated in the complaint were true, the court in reversing and remanding the case for a new trial said: "But we have no means of

55 See Breeze v. Doyle, 19 Cal. 104; Hidden v. Jordon, 28 Cal. 301; Jones v. Block, 30 Cal. 228.

56 Pratalongo v. Larco, 47 Cal. 378, 382.

57 Bank of Woodland v. Treadwell, 55 Cal. 379.

determining what facts the court deemed "material," and have no information from the findings on this point. So loose a method of finding the facts cannot be tolerated, and would lead to the most serious perplexities."[58]

It would also appear from the decision in Hardenberg v. Hardenberg,[59] that if the term "allegation' is qualified by the word "material," the general form of finding will be insufficient. The question was not entirely free from complication, however. The decision was from the bench—no opinion being filed. But in Cassidy v. Cassidy,[60] it was expressly held that a finding "all the material allegations of facts set forth in plaintiff's complaint are sustained and proven by the evidence" would not uphold a judgment, the court saying: "We have no means of determining what the court below may deem 'material' facts or averments." This case was followed by Warren v. Robinson,[61] where the finding was, "that all the material allegations in the plaintiff's complaint are fully sustained and proved" was held insufficient upon authority of the above noticed decisions.

Since a statement that an allegation is "fully sustained and proved" is the exact equivalent of one that it is true, there appears no doubt that the injection of the word "material" will render a finding which derives its whole force from its reference to a pleading too indefinite to support a judgment.

So it may be considered as settled that the general definite and unqualified finding by reference to pleadings, in the form previously indicated, is sufficient, but that the liberal doctrine of appellate courts with reference thereto will not be extended. And, notwithstanding its sufficiency, it is so much more convenient for the appellate court, and so much less likely to lead to a misconstruction as to what is, in fact, alleged and found, and to insure a careful consideration on appeal, that self-interest alone would recommend a clear, orderly and concise statement of the ultimate facts in the findings; or, if uncer-

[58] Ladd v. Tully, 51 Cal. 278. To same effect, Breeze v. Doyle, 19 Cal. 101, 106; Harlan v. Ely, 55 Cal. 340, 344.

[59] 54 Cal. 5911.

[60] 63 Cal. 352, citing Ladd v. Tully, 51 Cal. 279.

[61] 71 Cal. 380, 12 Pac. 265. See, also, Abrahamson v. Lamberson, 68 Minn. 456, 71 N. W. 676.

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tain as to what are respectively the ultimate facts, and the probative facts, which place the right claimed beyond all possible controversy, then of both the probative and ultimate facts.

It is not necessary to insert in the findings any written instruments upon which the right is based, if they are contained in any pleading. The pleading may, in such case, be referred to for their identification. A valuable suggestion on this subject is contained in an opinion by Chief Justice Field in Breeze v. Doyle,[62] as follows: "There is no doubt that reference may be had to the pleadings in the findings. As, for instance, it would be sufficient to find that the promissory note, mortgage, or other instrument set forth in the complaint, was executed by the parties, and at the time as therein alleged; and so with other matters alleged which are established by the evidence. But in all such cases, the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended."

§ 594. Finding upon immaterial issue not required.

And a finding upon an issue which disposes of the merits of the case may render a finding upon other issues unnecessary, though they be otherwise material; for instance, where the court makes an affirmative finding on plaintiff's case which is wholly inconsistent with the truth of defendant's case.[63]

The code provision is not construed to require findings upon all matters which parties may see fit to allege and controvert in their pleadings, but only upon material issues. Therefore a finding upon an immaterial issue will be disregarded.[64]

In line with the rule stated in the preceding section, it is held that, where, upon the findings actually made, the judgment must be the same, no matter how other issues not passed

62 19 Cal. 102, 106.

63 Snelgrove v. Earl, 17 Utah, 321 53 Pac. 1017.

64 Fountaine v. Southern Pac. R. R. Co., 54 Cal. 645, 654; Brison v. Brison, 90 Cal. 329, 27 Pac. 186; McCourtney v. Fortune, 57 Cal. 619; Belcher Consol G. M. Co. v. Deferrari, 62 Cal. 160; Maynard v. Locomotive etc. Assn., 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259; Martin v. Bank, 7 S. Dak. 263, 64 N. W. 127; Jackson v. Ellendale, 4 N. Dak. 478, 61 N. W. 1030; Snyder v. Emerson, 19 Utah, 319, 57 Pac. 300.

upon might have been found, the judgment will be sustained, and the omission to find upon such other issues treated as immaterial. The provision requiring findings, under the construction given it by the cases cited in the preceding section, only requires a finding upon issues which might be so found as to defeat the judgment, or require a different judgment. But, where a finding upon such issues could not, in view of the findings made, have this effect, a failure to make a finding thereon is not prejudicial. Accordingly, if a complaint sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of the issues thus made is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision "against law." [65]

[65] Brison v. Brison, 90 Cal. 323, 329, 27 Pac. 186. The court in this case distinguishes between such a failure to find upon an issue which does and which does not constitute a decision "against law," as follows: "When upon the trial of a cause the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial: Knight v. Roche, 56 Cal. 15. In such a case there has been a mistrial, and the decision, having been rendered before the case has been fully tried, is considered to have been a decision 'against law.' It will be observed, however, that this rule is applicable only in a case where the issues upon which there is no finding are 'material'; that is, where a finding upon such issues would have the effect to countervail or destroy the effect of the other findings. If a finding upon such issue would not have this effect, the issues cannot be regarded as material, and the failure to make a finding thereon would not be prejudicial: McCourtney v. Fortune, 57 Cal. 619. If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such finding is immaterial: Fountaine v. S. P. R. R. Co., 54 Cal. 654. If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision 'against law.'"

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§ 595. Ultimate, rather than probative facts should be four

While the above is the correct general rule, and findings probative facts are not necessarily conclusive,[66] yet, findings probative facts are sufficient, where the ultimate fact is nec sarily deducible therefrom. This qualification of the gene rule was allowed and explained in Coveny v. Hale,[67] wh the court said: "The court found a series of facts from wh the conclusion seems to have been drawn that the money separate property, and from which such is the necessary c clusion, as a matter of law, The finding is, therefore, su cient. The case would be different if there was merely a cital of evidence which would not conclusively establish t it was either common or separate property. The court, hav detailed facts in its decision—from which the conclusion t the money was separate property was necessarily drawn— particular facts found and claimed not to be supported by evidence should have been specified in the bill of exc tions. . . . . Of course, it is only when the conclusion foll as a matter of law (in other words, when the ultimate or is able fact becomes a conclusion drawn from the lesser fac that such a finding will be held sufficient."

§ 596. Findings must be within the issues when compa with the pleadings.

If a finding, though it might appear upon examination the evidence to be within the issues, yet, without such ex ination is without the issues, it cannot be treated as a find upon any issue in the case, since, in determining the point, supreme court cannot examine the evidence.[68]

§ 597. Findings should not be of legal conclusions, or of c clusions of mixed law and fact.

It is well settled that mere conclusions of law cannot made to perform the office of findings.

66 See O'Connor v. Frasher, 53 Cal. 435. See, also, Snodgr v. Parks, 79 Cal. 55, 21 Pac. 429.

67 49 Cal. 552, 556. For a case in which the probative fa found were held insufficient, see Downing v. Graves, 55 Cal. 544

68 Lang v. Specht, 62 Cal. 145.

It is often difficult to distinguish between a statement of an ultimate fact and one of a legal conclusion; and it is still more difficult to distinguish between a statement of pure fact and one containing a mixture of fact and legal inference. If the practitioner is uncertain whether the case admits of any general statement, by way of a finding which will not be open to attack as a conclusion of law, rather than a finding of fact, he should secure, if possible, a finding in the general form, and also one embracing all the secondary facts upon which it is supported.[69]

Where probative facts alone are found, the judgment can only be upheld upon an inference of the existence of the ultimate fact. And it is held that the fact to be inferred must inevitably follow from the facts found. "In other words, the nonexistence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the facts which are found."[70] Where the probative facts

[69] See McGowan v. Sullivan (Ariz.), 52 Pac. 986; Acts 1897, Ariz., No. 22, § 1; Daggs v. Haskins (Ariz.), 52 Pac. 357; Newhall v. Porter (Ariz), 62 Pac. 689, all holding that a general finding in favor of the defendant is sufficient; Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084, holding a finding that defendant was indebted to plaintiff in a given sum is a finding of fact and includes a finding that it was unpaid: Naddy v. Deitze, 15 S. Dak. 26, 86 N. W. 753, holding in an action to quiet title, that where the complaint merely alleged generally that plaintiff was the owner and entitled to possession of the property, a finding that plaintiff was not the owner or entitled to possession was sufficient, without a finding of the specific facts on which the plaintiff relied: Noyes v. King County, 18 Wash. 417, 51 Pac. 1052, holding that a general finding that plaintiff has failed to make out a case is a sufficient foundation for decree of dismissal, a finding held to be a conclusion of law; Brauer v. Portland (City of), 35 Or. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378. It is immaterial whether a particular finding is of an ultimate fact or a conclusion of law where there are other findings in support of that which is questionable: Snyder v. Emerson, 19 Utah, 319, 57 Pac. 300.

[70] Emmal v. Webb, 36 Cal. 197, 204. To same effect, Bull v. Bray, 89 Cal. 286, 293, 26 Pac. 873; Oneto v. Restano, 78 Cal. 376, 20 Pac. 743; Biddel v. Brizzolara, 56 Cal. 381; Packard v. Johnson, 57 Cal. 183. A valuable illustration and review of the authorities is found in the opinion in Bull v. Bray, supra, as follows: "Appellant contends that the absence of a finding of intent is immaterial, be-

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are found, and also a general conclusion which would, withou the former, be treated as a statement of mixed law and fac the latter will usually be treated as a conclusion of law. Thi

cause the conveyance being voluntary, the grantor being insolvent and the conveyance having defrauded the creditor, the intent to de lay and defraud follows as an absolute and conclusive presumption and the intent, being the ultimate fact, necessarily results fro such probative facts. In order to support this contention, the ult mate fact must follow necessarily; that is, as a matter of la from the other facts. In Covney v. Hale, 49 Cal. 556, the court said 'Of course it is only when the conclusion follows as a matter of la that such a finding will be held sufficient.' 'The only inferenc which we can draw from the findings,' said the court in De Cel v. Porter, 65 Cal. 10, 2 Pac. 257, 3 Pac. 120, 'are inferences of la We are not allowed to draw inferences of fact from the facts foun If this court would infer a fact from other facts, it would be usur ing the province of the trial court, which alone can find the facts issue. This is the rule with regard to special verdicts, and we a of the opinion that the same rule applies to findings of fact.' the same effect, are the cases of Chandler v. People's Sav. Bank, Cal. 499, 4 Pac. 502; Salisbury v. Shirley, 66 Cal. 228, 5 Pac. 10 Hibberd v. Smith, 67 Cal. 556, 56 Am. Rep. 726, 4 Pac. 473, 8 Pa 46. It may be conceded that it would have been perfectly prop for the trial court to have drawn an inference of fact as to t fraudulent intent of the grantor from the other facts found; and th this court might be justified in setting aside a finding to the co trary as not being supported by the evidence (Judson v. Lyford, Cal. 505, 24 Pac. 286), but that does not dispense with the necessi of an actual and express finding as to the ultimate fact as a fa by the lower court, nor authorize this court to exercise what wou be original jurisdiction by supplying a finding upon this most vi and essential matter. As section 3442 of the Civil Code decla that the question of fraudulent intent is 'one of fact, and not law,' it is not entirely plain that this court can, under any state facts, however plain they might be, hold that the ultimate fa might flow from the probative fact as a matter of law. But assu ing that the ultimate fact of 'intent to defraud' may flow as 'mat of law' from the probative facts, yet, to obviate a finding of t ultimate fact, the facts found must necessarily and conclusively dicate that the grantor was possessed of the intent to defraud the time the conveyance was made. If the facts found do not a solutely exclude all possibility of the absence of fraudulent int in the mind of the grantor, then the want of the finding of su intent cannot be dispensed with in this court. Thus in the ca of Emmal v. Webb, 36 Cal. 204, the court, in considering whether could infer a fact from other facts, said: 'To warrant us in so

was well explained and illustrated in Savings and Loan Society v. Burnett.[71] The trial court, in very voluminous findings, set forth the specific probative facts and circumstances of the transactions of the parties, and went no further. Under its conclusions of law separately stated was found this language: "And as conclusions of law, this court finds: That plaintiff was not at the time of the commencement of this action, ... the owner or seised in fee . . . . of the land in the complaint described." Respondents, urging an affirmance of the judgment, contended that this was a misplaced finding of fact, and that, as such, it should be held to have superseded and rendered nugatory the specific findings of secondary facts, and cited several decisions by the court. But the court distinguished them from the case before the court, saying: "In each of them, the appellant was seeking to overthrow the judgment, because of the alleged absence of a finding. A sufficient finding has been placed in the conclusions of law, and in nearly, if not quite all, of the cases, it was the finding of a simple, unmixed, ultimate fact. Under such circumstances, this court evinced a natural and strong unwillingness to consider so technical an objection, and to reverse a case fairly tried, and set aside a judgment justly given, because of a mere clerical misprison. . . . . It is true that ownership may be pleaded and found as an ultimate fact. No reference is needed to the numerous cases so holding. But it is equally true that ownership may be pleaded as a conclusion of law, and may be determined by the court as such a conclusion, and not as a fact. . . . . Still further, if it be regarded as a misplaced finding of fact, or a mixed matter of law and fact, which should be treated as a finding, it is, nevertheless, a finding drawn from the special fact of payment. If full authority is not to be given to the

ing, the fact to be inferred must follow inevitably from the facts found; or in other words, the nonexistence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found.' And to the same effect, are Coveny v. Hale, 49 Cal. 356; Younger v. Pagles, 60 Cal. 520; Walker v. Buffandeau, 63 Cal. 312; Coglan v. Beard, 65 Cal. 63, 2 Pac. 737; Alhambra Addition Water Co. v. Richardson, 72 Cal. 601, 14 Pac. 379.''

71 106 Cal. 514, 539, 540, 39 Pac. 922.

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declaration of the judge, who, by putting it in the conclusion holds out that he has reached the result by the application the law to the facts, at least, some weight must be accorded his action, unless the error is merely a misprision. Treat it, then, as a finding, it is a finding drawn from the facts pr viously found. But a general finding, drawn as a conclusi from facts previously found, cannot stand if the specific fac do not support it." A very learned opinion on the technic distinction between a statement of an ultimate fact and of conclusion of law was rendered in Levins v. Rovegno,[72] whe the case presented was almost identical with that just notice The importance of the context was also emphasized in the l cited case. The facts were specifically found, and the co held that the trial judge had properly treated the declarati of ownership as a conclusion of law. But the effect upon su general finding, whether found among the findings proper among the conclusions of law, was also clearly pointed out People v. Reed,[73] where the court said: "But, conceding th the finding is one of fact, or, as counsel terms it, a 'conclusi of fact,' it is apparent that the court below did not intend cut off the right of the appellant to test the sufficiency of t specific facts found to show such dedication in the manner dicated. This finding is based upon the other facts found. recites in terms that 'by the acts, facts, and matters ab found, said premises were by said parties dedicated,' etc. may be that, if this finding had stood alone, and had not be put in this argumentative form, it might have been uph as a sufficient finding of an ultimate fact. But this cann be so where the facts are fully found, and the general findi of a dedication is expressly drawn as a conclusion from su facts. Counsel says that it does not appear that the co found all of the facts proved. But it does appear from t finding itself that it was based entirely upon the facts fou and not, in whole or in part, on facts proved but not fou Therefore, if the specific facts found do not support this c which is a summing up of the others, the judgment should reversed."

72 71 Cal. 273, 15 Pac. 430.

73 81 Cal. 70, 75, 15 Am. St. Rep. 22, and note. To same effe Geer v. Sibley, 83 Cal. 1, 23 Pac. 220.

Whether A is indebted to B is a mixed question of law and fact. Such an issue, when contested, can only be determined after a trial in which evidence is introduced, and the law applied to the facts found. When tried before a jury, they should be, and usually are, instructed as to the rules of law to be applied to the facts which they find to exist. But a general verdict is synthetic—a compound of law and fact—while the special verdict is analytic. It finds the facts and submits the law to the court. In like manner, the court trying the case, performing the dual functions of both jury and court, should first ascertain the facts without reference to law, except the law of evidence, and then return its special verdict, called findings. The "naked facts," as Blackstone styles them,[74] are alone found, from which every element of law should be eliminated.

In considering how findings should be prepared, otherwise than in the general form, and with a view to avoiding conclusions of law, it is well to bear in mind that they perform identically the function of a special verdict, as distinguished from a general verdict. The former responds exclusively to one or more issues of fact, while the latter contains not only a decision upon such issues, but also a general legal conclusion.[75]

Since there is no better guide to a determination of the distinction herein than the adjudications, some of these will be referred to as illustrations of particular instances of findings which were held to be the one or the other. In Murphy v. Bennett,[76] the findings objected to as conclusions of law were as follows: "That the plaintiff was not the owner of the frame building," etc. "That the defendant was the owner of said building," etc. The court said: "Here the allegation in the complaint is that the plaintiff 'was the owner of a certain frame building, situated,' etc. The answer denied that the

[74] 3 Blackstone's Commentaries, 377.

[75] That the finding of facts by a court is in substance a special verdict, see Garfield v. Knights Ferry etc. W. Co., 17 Cal. 511; Breeze v. Doyle, 19 Cal. 101; Jones v. Block, 30 Cal. 229, 89 Am. Dec. 88; Insurance Co. v. Folsom, 18 Wall. 249; Van Slyke v. Hyatt, 46 N. Y. 262; Meacham v. Burke, 54 N. Y. 218.

[76] 68 Cal. 528, 9 Pac. 738.

STANFORD LAW LIBRARY

plaintiff was the owner of the building. Whether the plaintiff did own the building or not was, then, the ultimate fact to be determined, and upon the issue thus raised, the court found against the plaintiff. We think it clear that the findings referred to are findings of fact, and not conclusions of law. So, a finding "that the plaintiff did not own the several tracts of land described in the several answers of defendants, but that the defendants owned the same in severalty, as set forth in their answers," was held sufficient to support the judgment in an action of ejectment.[77] And a finding "that the plaintiff was the owner and in possession of the property on the day that the defendant seized upon it, and removed it from his possession, custody and control," was held sufficient, in an action to recover damages for the conversion of personal property.[78]

A finding that the defendant "has a good and perfect title to said property" was also held sufficient.[79] It is apparent that such findings possess all the elements of general verdicts and contain elements of both law and fact. Findings of ownership must be treated as exceptions to the general rule on the subject; an exception which, however, appears to be as firmly established as the rule itself. It is an exception founded upon necessity. It can be easily justified on the score of convenience, there being no alternative between alleging or finding that one is "the owner" and setting forth all the facts upon which his ownership rests, such facts being generally and largely, evidentiary.

Possessed or not possessed is a naked question of fact. There is no question of law mixed with it.[80]

§ 598. Findings should not set forth evidence.

A distinction is undoubtedly taken in law between what are known as probative or secondary facts and those designated as evidentiary, though often the same fact will belong to both classes. To illustrate: take the case of an action on a prom

77 Smith v. Acker, 52 Cal. 217.

78 Haley v. Nunan, 11 Pac. C. L. J. 523.

79 Frazier v. Crowell, 52 Cal. 399.

80 Porter v. Woodward, 57 Cal. 538.

sory note. That the maker is indebted to the payee is the legal conclusion upon which the judgment rests. But it is also the statement of a fact. Said conclusion rests upon the secondary facts that the note was executed and delivered, that the time for payment has lapsed without its being paid. But the note itself is evidentiary of an agreement, back of its execution and delivery; and a finding in such action which merely recited such agreement and the consideration therefor, without reference to the note would not support the judgment. There are numerous illustrations of the recognition and enforcement of this requirement as to findings. Thus, in Peco v. Cuyas,[81] the court said: "Several of the original findings of the court, and most of the additional findings made at the request of plaintiff's counsel, and to which much of their argument is addressed, are obnoxious to the objection that they were merely statements of the evidence upon which the findings of fact were based. It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for a new trial, and statement of evidence upon the motion." And where there were specific findings of facts which tended to show notice to a mortgagee of an adverse possession, and a general finding "that plaintiff, when he took and recorded his mortgage, had no notice" of the claim of one holding adversely, it was held that the latter controlled, unaffected by the former.[82]

§ 599. The mere misplacement of a finding of fact among the conclusions of law does not affect its character as a finding.

This rule is justified by the statutory direction that mere informalities, not affecting the merits, shall be disregarded, and is followed in many cases as a matter of course. Thus, in Edwards v. Sonoma Valley Bank,[83] the court, affirming the judgment, said: "The court found, as a fact (although the finding is among the conclusions of law), that there was not an immediate delivery or continued change of possession by and

[81] 47 Cal. 174, 177.

[82] Hillman v. Levy, 55 Cal. 117.

[83] 59 Cal. 148.

STANFORD LAW LIBRARY

from A. S. Edwards to Harasthy. We cannot say that this finding is not sustained by the evidence, or that it is contradicted by, or cannot coexist with, the probative facts found." So, in McCarthy v. Brown,[84] the court said, of a controlling finding, that its force was not impaired by its having been placed under the heading of conclusions of law. And in Bath v. Valdez,[85] the court said: "It is true that the prominent facts which negative plaintiff's adverse holding under the statute of limitations are to be found in the conclusions of law. This displacement, however, does not alter or detract from their efficacy as facts, and, under the former rulings of this court, does not prevent the finding from being accepted as sufficient to support a judgment." But the position of a proposition which is one of fact or of law, according to the context, among the conclusions of law, is a clear indication of how the lower court regards it, and may, for that reason, affect the decision of that question.

The practice of blending conclusions of law and findings of fact is at variance with the letter, as well as the spirit, of the statute. And when the facts are so obscurely found, or so blended with legal conclusions, as to render it doubtful whether the facts are positively or only hypothetically stated, they will be disregarded.[86]

§ 600. How facts to be stated.

A statement of a fact in a written decision was in one case treated as a finding, there being no formal findings filed.[87] But, as findings and not written opinions, constitute a part of the judgment-roll, the doctrine of that case should certainly be restricted rather than extended.[88]

84 113 Cal. 15, 19, 45 Pac. 14.

85 70 Cal. 350, 355, 11 Pac. 724. See, also, Jones v. Clark, 42 Cal. 192; Brenner v. Liverpool L. & G. Ins. Co., 51 Cal. 107, 21 Am. Rep. 703; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Spargur v. Heard, 90 Cal. 228, 27 Pac. 198; Millard v. Legion of Honor, 81 Cal. 343, 22 Pac. 864.

86 Figg v. Mayo, 39 Cal. 262, 266.

87 See Meek v. McClure, 49 Cal. 623, 626.

88 See Victor G. & S. Min. Co. v. National Bank, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72; Utah Rev. Stats., § 3168. In this case,

There are various styles of composition, and there can be no set formula for findings; and yet, it is an advantage to the party relying upon them, and sometimes of vital importance, that they be direct and positive in form, and clear and concise, yet full in expression. Some of the dangers that may lurk in the blending statements of fact with conclusions of law have been already adverted to.[89] And for still better reasons, statements of fact should be free from hypotheses, arguments, and unnecessary adjuncts. But, notwithstanding the foregoing suggestions—they being but one form of stating what has been often said—the criticisms and advice of appellate courts, continuing, from the earliest adoption of the system of express findings to the present, give ample evidence of the difficulty of teaching herein by precept. A valuable suggestion on this subject is to be found in the opinion in Hidden v. Jordan,[90] as follows: "The finding should consist of a concise, distinct, pointed and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found. This is the finding contemplated by the statute, which is to be annexed to, and form a part of, the judgment-roll. If an opinion is written—and we are always glad to find one in the transcript—it should be entirely separate from the finding, and filed among the papers in the case." So is the practice of attempting to combine findings and a written opinion in one paper condemned. Thus, in McGlory v. McGlory,[91] the court said: "It is a gross misnomer to call this a 'finding of facts,' within the meaning of the Practice Act—it is merely an opinion of the judge, in which he states his reason why, in his judgment, the findings of fact ought to

held that an opinion setting forth facts is not a compliance with the statute requiring express findings of facts.

89 See ante, § 597.

90 28 Cal. 302, 306.

91 38 Cal. 577. See, also, Wilson v. Wilson, 64 Cal. 94, 27 Pac. 861, holding opinion no part of record per se; Wixson v. Devine, 67 Cal. 342, 7 Pac. 776, excluding opinion in connection with offer of judgment-roll as res adjudicata; James v. Williams, 31 Cal. 213; Figg v. Mayo, 39 Cal, 265, obvious truth and pertinency.

STANFORD LAW LIBRARY

be against the plaintiff and in favor of the defendants. We cannot regard it as a finding. To do so would be to countenance a practice which we have repeatedly denounced as wholly at variance with the meaning and intent of the Practice Act in relation to findings."

§ 601. Findings must not be contradictory.

Care should be taken that findings do not contradict each other. Except where a finding of an ultimate fact overcomes specific findings of probative facts, as before explained, findings which cannot be reconciled, nullify each other.[92] And unless, barring the findings which are clearly contradictory to each other, enough remains to support the judgment, it will be reversed, for want of findings: "The rule on this subject may safely be said to go this far, at least—that where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way or the other is essential to the correctness of the judgment, there the judgment cannot stand. If one part of the contradictory finding would support the judgment, and another part would necessarily upset it, then the judgment must be reversed."[93] And in an action of ejectment, it was held that two findings, each directly contradicting the other on the question of the defendant's possession, were equivalent to a failure to find at all on that issue, the court saying: "When findings are directly antagonistic, it cannot be said that either finding is correct, or at least, which is correct."[94]

A strange medley of contradictions was presented in Slo v. Allman.[95] The court found payments to the plaintiff of a amount in excess of the entire undertaking stated in the complaint, and then found a considerable balance still due the plaintiff. The action was upon a memorandum agreement

92 Randall v. Hunter, 66 Cal. 512, 6 Pac. 331; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124.

93 Learned v. Castle, 78 Cal. 454, 460, 18 Pac. 872, 21 Pac. 1. See, also, Kerns v. McKean, 65 Cal. 411, 4 Pac. 404; Randall v. Hunter, 66 Cal. 512, 6 Pac. 331; Carman v. Ross, 64 Cal. 249, 29 Pac. 51

94 Manly v. Howlett, 55 Cal. 94, 96. See, also, Randall v. Hunter, 66 Cal. 512, 6 Pac. 331.

95 64 Cal. 47, 30 Pac. 574.

which was reduced to writing, but never signed; and yet the court found that this writing superseded the memorandum. But the fact that findings made upon issues not tendered by the pleadings are inconsistent with each other is not ground for reversing the judgment, if no material issues are tendered by the pleadings.[96]

§ 602. When finding of probative facts disregarded.

There is a nice, but important, distinction to be noted in this connection. It will be observed that the principle illustrated in a preceding section is applicable only when the general conclusion is either a statement of fact or a conclusion of law, according to the context, that is, according to whether, in addition to its statement, there is or not a finding of the probative facts which, taken altogether, do not support it. That principle does not apply, however, where the general conclusion is a statement, or finding, of an ultimate fact, regardless of the context—in other words, under any and all circumstances. In the latter case, the finding of the ultimate fact controls, and the finding of secondary or probative facts will not be permitted to control, limit or modify the finding of the ultimate fact. If, in such case, the appellate court could consider the probative facts and thereby determine that the judgment was not supported by them, it would amount to an investigation of the sufficiency or insufficiency of the evidence upon the judgment-roll. This, it is well settled, it cannot do. Thus, in Smith v. Acker,[97] the court said: "It has been held that where facts are found from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as a finding of the ultimate fact. But when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the principal finding. . . . . This point could only have been made on motion for a new trial, or on appeal on a statement or bill of exceptions specifically pointing out the deficiencies in the evidence." In other

[96] Bulwer C. M. Co. v. Standard C. M. Co., 83 Cal. 589, 23 Pac. 1102.

[97] 52 Cal. 217. To same effect, Pico v. Cuyas, 47 Cal. 174, 177.

STANFORD LAW LIBRARY

words, the opposing party must be allowed to show what the evidence was, and is not concluded by the finding of probative facts. The above decision was affirmed in subsequent cases.[98] This rule is the same whether the probative facts are found in connection with a finding of the ultimate fact or be inconsistent with it. In Hidden v. Jordan,[99] the court appears to have held that, in such case, the specific findings of probative facts would control; but that decision cannot be considered sound in view of the well-established, general rule above stated, and of the subsequent decision to the contrary there cited. The case was cited and approved in one subsequent case,[100] but it is to be noted that the general conclusion was a mixed conclusion of fact and law, which places the case within the rule stated in the next preceding section, so that the doctrine of Hidden v. Jordan was irrelevant.

§ 603. Construction of findings.

The same general rule of construction applies to findings as to pleadings and instructions. In construing a particular finding, not only must the issues made by the pleadings be kept in view, but the relation of the particular finding to others is to be considered. In other words, all findings within the issues are in pari materia, and are to be construed together. The findings of a court cannot be altogether detached from each other, and considered piecemeal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning.[101] And in Al-

98 Perry v. Quackenbush, 105 Cal. 299, 305, 38 Pac. 740; Gill v. Driver, 90 Cal. 72, 27 Pac. 64.

99 28 Cal. 302, 306.

100 Warder v. Enslen, 73 Cal. 291, 14 Pac. 874. Also approved as authority in Walley v. Deseret Bank, 14 Utah, 322, 47 Pac. 147, and Barnes v. Sebron, 10 Nev. 248. In the latter case, however, the judgment was reversed because the findings were not supported by the evidence.

101 Millard v. Hathaway, 27 Cal. 121, 141. See, also, Kimball v. Lohmas, 31 Cal. 156; Polack v. McGrath, 38 Cal. 669; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 604, 14 Pac. 379; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Mott v. Ewing, 90 Cal. 231, 234, 27 Pac. 194; Barnes v. Sabron, 10 Nev. 248; Moore v. Booker, 4 N. Dak. 543, 62 N. W.

hambra etc. Water Co. v. Richardson,[102] the court said: "The fallacy of the argument of the ingenious counsel for the appellant is in assuming that each finding must be considered separately, and that one cannot be 'helped out' by the others. The counsel treats the findings as if they were dug up from the ruins of ancient cities at different epochs. But we think that they must be read together."

§ 604. Agreed statement in lieu of findings.

The California Code of Civil Procedure contains no provision authorizing the use of an agreed statement of facts as any part of the record on appeal. But the decisions of the supreme court unerringly point the way to the use of such statements as effectually as was provided for in the Practice Act after its amendment in 1866, by which it was provided that. when any cause was tried and submitted upon a written statement of facts, agreed to by the parties, or their attorneys, such statement should have the effect of a special verdict or finding of facts, and that judgment should be pronounced thereon, as upon a special verdict or finding of facts; that, in such case, no finding of facts should be made unless such statement should fail to embrace all the facts proved and in issue, in which case any additional fact might be found upon evidence which was not repugnant to the agreed statement.[103] This provision was construed to constitute such agreed statement a part of the

607; Thompson v. Brannan, 76 Cal. 618, 18 Pac. 783, holding that if findings substantially cover the issues, fact that they are clumsily drawn, and show upon their face an ambiguity due to erroneous capitalization and punctuation, will not be ground for reversal of the judgment; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490, holding that when a finding of fact is susceptible of two constructions, one of which is supported by the evidence and the other not, only that construction which is supported by the evidence will be considered, yet that if the findings, when construed in harmony with the evidence do not support the judgment, it must be reversed.

102 72 Cal. 598, 604, 14 Pac. 379.

103 Laws 1865, p. 844. A somewhat peculiar conclusion was reached in Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969, to effect that where there is no conflict in the evidence, it is virtually an agreed statement of facts, and, as such, properly belongs to the judgment-roll.

STANFORD LAW LIBRARY

judgment-roll without any order or stipulation to that effect.[104] But even prior to this amendment, and without any statute authorizing it, the right of the parties to make such agreed statement a part of the record on appeal was recognized. It was so decided in Burnett v. Pacheco,[105] where the agreement of the counsel itself stipulated that it might be used by either party "in any and all proceedings in the action."

Notwithstanding the absence of any provision in the code on the subject the right of the parties to use an agreed statement on appeal, in lieu of findings, was fully recognized in Muller v. Rowell.[106] The report does not state whether the agreement was brought up as part of the judgment-roll, or in the bill of exceptions in the record. Nevertheless, the agreed statement had been, in this case, used by the trial court in lieu of findings. On appeal the appellant alleged error in the failure to file findings, which were not waived. The court said: "It thus appears that the court adopted the facts stipulated by the parties as the facts of the case and based its judgment thereon. Under such circumstances, and it appearing that these facts fully support the judgment, no other or more formal findings were required. The statement of facts so agreed to took the place and served the purposes of a formal finding of the court. It is only where the facts are in issue that findings thereon by the court are necessary in any case; and where the parties stipulate in writing as to what the facts are, and file such stipulation in the action, it is in all substantial respects the equivalent of admitting them in the pleadings." In Denison v. Burrell[107] the right to constitute such agreed statement a part of the judgment-roll was at least recognized. The lower court had, as in Muller v. Rowell, adopted the statement as its findings. The appellate court said: "The stipulation of facts is, under agreement of the parties, made a part of the judgment-roll, and may here be considered as the findings upon

104 See Brewster v. Hartley, 37 Cal. 15, 23, 99 Am. Dec. 237, where, however, the parties, through abundance of caution, presumably, stipulated that their agreement should constitute part of the judgment-roll.

105 27 Cal. 411.

106 110 Cal. 318, 42 Pac. 804.

107 119 Cal. 180, 51 Pac. 1.

which the judgment was based." There is, then, no doubt that the court may use such agreement as its findings, and it results that by such adoption it is entitled to a place in the judgment-roll. Neither is there any doubt but that where the agreement fails to cover all the facts the court may find any additional facts upon evidence, not repugnant to the agreement, as well in the absence of statutory authority as under the act of 1866. Such additional finding would be part of the judgment-roll and necessarily the agreed statement.

§ 605. Findings by referee.

The subject of findings by referees has been necessarily treated at some length elsewhere.[108] The statutes of Montana on the subject are fairly representative. They provide, among other things, that, when a referee is to report the facts, the findings reported shall have the effect of a special verdict. It was held that where the reference provided that a referee should take testimony, and state a complete account between the parties, but did not authorize him to hear and determine the issues, his findings could not be given the effect of a special verdict since the scope of a referee's authority must be determined by the terms of the order of reference.[109]

§ 606. Findings must be filed in proper time.

Signing of what purports to be findings does not constitute findings. It requires both reduction of the decision to writing and its filing with the clerk to constitute the decision called for by the statute, and where the findings were signed in a county other than that in which the action was tried, and forwarded to the clerk to be filed, it was held that no decision was rendered prior to the filing, the court saying: "It was not the signing, but the filing, of the findings and order for judgment that determined the action. We are quite confident that there is no law that requires a judge to deliberate upon a case or to prepare his findings and order for judgment in the county in which the cause is pending."[110]

108 See ante, § 16.

109 Murphy v. Patterson, 24 Mont. 575, 63 Pac. 375; Mont. Code Civ. Proc., § 1141.

110 Comstock Q. M. Co. v. Superior Court, 57 Cal. 625

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The direction of the code is that the filing of the written decision should be "within thirty days after the cause is submitted for decision."[111] The section as first adopted required that the decision be filed within thirty days, and further provided that unless it was filed within that time the cause should be retried. In McQuillon v. Donahue[112] it was held that the provision as to a retrial was directory merely. In that case, after the lapse of thirty days, the attorney for the defendant moved the court to have the cause placed upon the calendar for retrial, which motion was denied; and on appeal the order was affirmed on the ground that the provision was directory, and not mandatory. In 1874, and subsequent to the last-mentioned decision, the section of the California code was amended to its present form. It was held under the first system of express findings that findings might be filed after as well as before judgment;[113] also after the adoption of the system of so-called implied findings;[114] but it appears to be settled otherwise, under the provision of the Code of Civil Procedure on the subject.[115]

§ 607. Power of court over findings in case of mistake, misapprehension, etc.

There is no doubt of the power of the court, in a proper case, and within proper time, to correct and even to set aside and annul findings filed under misapprehension, or by mistake.[116] This power extends further than that of correcting obvious clerical errors, which are apparent upon inspection. The latter may be corrected as, of course, and without any proceeding by, or notice to the parties. If, however, the change influenced the

111 Cal. Code Civ. Proc., § 632.

112 49 Cal. 157. To same effect, Lynch v. Coviglio, 17 Utah, 106, 53 Pac. 983. Same view in Roblin v. Palmer, 9 S. Dak. 36, 67 N. W. 949.

113 Vennule v. Shaw, 4 Cal. 214.

114 Broad v. Murray, 44 Cal. 229.

115 Knowlton v. McKenzie, 110 Cal. 183, 42 Pac. 580; Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077. See, also, Schwartz v. Stack (Nev.), 65 Pac. 351; Nevada Comp. Laws, § 3277; Clawson v. Wallace, 16 Utah, 300, 52 Pac. 9; Klapenstine v. Hays, 20 Utah, 45, 57 Pac. 712.

116 See Prondzinski v. Garbutt, 9 N. Dak. 239, 83 N. W. 23.

legal effect of the findings, it would be otherwise. That would not be a correction, but the substitution of one finding for another. In Wunderlin v. Cadogan,[117] the court said: "The rules, however, do not prevent the court from correcting mere misprisons and orders improvidently and unintentionally entered. That a given order is of that unusual character is not to be presumed, but must be affirmatively shown." In this case the court had filed a second set of findings, stating that the first set were made "under a misapprehension." Continuing, the court said: "It does not clearly appear what the misapprehension consisted in, or whether it was not a mere misapprehension of the effect of evidence; and, therefore, it is a close question whether the case falls within the rule of the exception above stated. It is not necessary to determine this question, however; for if it be assumed that the court had power to set aside the findings as improvidently and unintentionally made, the defendants had a right to be heard upon the question; and the court had no power to proceed to annul the findings in their favor without notice to them."

With reference to the time within which the order setting aside or changing the findings as for mistake or misapprehension may be made, there appears to be no settled or definite rule. The time prescribed in section 473 of the California Code of Civil Procedure for such motions generally is "within a reasonable time, but in no case exceeding six months." Without further light from the authorities nothing more definite can be offered. But doubtless it would be held to be unreasonable delay if the order were postponed until after a motion for a new trial had been passed upon, or until an appeal from the judgment had been taken and perfected.[118]

§ 608. Power of court to amend findings.

As to whether, in the absence of a statute expressly allowing an amendment of findings after they are filed, and before the entry of judgment, the court has power to amend them, and as to the extent of its power where it is recognized, the authorities are not in entire harmony. Such power appears to have been

117 75 Cal. 617, 619, 17 Pac. 713.

118 See Bate v. Miller, 63 Cal. 233.

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fully established in California, but its extent has not been fu defined. This power is also recognized in Utah, under simil statutory provisions as those in California; and it is there h not reversible error for the court to amend the findings of f while a motion for a new trial is pending, where the amen ments are responsive to issues presented by the pleadin and are supported by the evidence.[119] In Spaulding Howard[120] the court made an erroneous statement of what w held in Hayes v. Wetherbee,[121] and on that basis gave utt ance to untenable and misleading dicta, implying that the co may at any time before entry of judgment make and file an tire new set of findings, warranting a judgment different fr that authorized by the original findings. The court said no ing in the latter case to warrant any such inference. Nor h any such doctrine ever been declared by the supreme court, u less the aforesaid dicta may be construed to be such a declarati In the other of the two cases cited by the court,[121a] the co said what appears to negative rather than uphold the power the extent indicated. It was this: "With the exception of two corrections which we have noted the paper indorsed 'fi ings,' filed on the 14th, was practically a copy of the one dorsed and filed on the 13th, and if the filing of the sec was error, it was not a prejudicial one, for all that there new in it was finding of certain probative facts, not necess to be found, the ultimate facts already found being sufficie Both sets of findings were filed before judgment. Both brought up to this court. Either is sufficient to support judgment, and there is nothing in either that conflicts with other in any matter material to the issues in the cause or judgment entered." The positive views expressed in Wun lin v. Cadogan,[122] which have never been repudiated or m fied, appear to limit the power of the court to supplying o

119 Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029. As to po of court to amend findings, see Martin v. Bank, 7 S. Dak. 263, N. W. 127.

120 121 Cal. 194, 198, 53 Pac. 563.

121 60 Cal. 396, 399.

121a Smith v. Taylor, 82 Cal. 533, 544.

122 75 Cal. 617.

sions in the findings first filed, and corrections of clerical errors, and to prohibit the substitution of one finding for another. In this case the court said: "The remedy for erroneous findings of fact is by motion for new trial. And the relief to be given upon such motion is the awarding of a new trial to be had in regular course. It is not proper for the court upon a motion of that kind to immediately render a contrary decision. These rules rest upon the theory that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place." By comparison of the above decision with those rendered during the regime of implied findings, it would sem that this rule is the same under both systems.[123]

The proposition that the court cannot amend its findings, whether by substitution or otherwise, so as to call for a judgment in any material respect different from that authorized by those first filed, is strengthened by a consideration of the effect which a contrary rule would have upon the rights of the parties with respect to proceeding for a new trial. The time given for initiating the latter proceeding begins to run from the date of the decision; and the filing of findings constitutes the decision.[124] Now, if the court may amend its decision after it is filed so as to constitute a different decision at all, it may do so as well after as before notice of intention to move for a new trial is given by the losing party under the first decision. A proceeding for new trial once instituted cannot, however, be abandoned for the purpose of renewal. If abandoned at all, the right is gone.[125] A new and different decision might necessitate the proceeding upon different grounds than those designated in the first notice; but the party would thus be deprived of any right to urge or rely upon any grounds not designated in his first notice. Again, the amendment of the findings might remove some of the grounds relied upon in the first notice, and the movant might in view of that fact desire to urge a ground which could only be supported by affidavits; and, al-

123 See Hidden v. Jordan, 28 Cal. 304, 305; Corang v. Rogers, 34 Cal. 652; Prince v. Lynch, 38 Cal. 531, 99 Am. Dec. 427, and note.

124 See ante, §§ 2, 360, 361.

125 See ante, § 426.

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though such ground might have been designated in the original notice, and affidavits named in part as the basis of the motion, yet the time for serving and filing them might lapse prior to making the amendment.[126]

Findings filed after the entry of judgment are nugatory, under the more recent and best considered cases. That this is so was conceded in Spaulding v. Howard, above noticed; and the proposition just stated is abundantly sustained by decisions of the same court.[127] And in Ayres v. Burr[128] the court enforced that rule against filing the findings after judgment, even against a stipulation of a contrary effect. In Los Angeles v. Lankershim[128a] the court said: "After the entry of final judgment the court has no power to change the findings of fact in any material respect. The superior court has power to set aside judgments and findings upon various grounds, as provided in the Code of Civil Procedure; but there is no provision of law authorizing any change in the findings of fact after the entry of final judgment thereon, while the judgment is allowed to stand. The entry of final judgment terminates the jurisdiction of the court over the cause and the parties, except as otherwise expressly provided by law." The reason why the power to file findings after the entry of judgment, under the system of implied findings was recognized, is disclosed in one of the several cases which might be cited declaratory of such power, as follows: "The statute authorized exceptions for defective or insufficient findings, and we must presume such exceptions were filed and served. It is settled that when a cause is submitted in term the findings and judgment may be filed in vacation. And when additional findings are called for they may be, and ordinarily must be, filed subsequent to the entry of judgment."[129]

126 See Polhemus v. Carpenter, 42 Cal. 375, 384.

127 Knowlton v. McKenzie, 110 Cal. 183, 187, 42 Pac. 580; Richter v. Herringsan, 110 Cal. 530, 537, 42 Pac. 1077; Ayres v. Burr, 132 Cal. 125, 64 Pac. 120; Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427 and note.

128 132 Cal. 125, 64 Pac. 120.

128a 100 Cal. 525, 532.

129 Ogburn v. Connor, 46 Cal. 437, 354, 13 Am. St. Rep. 213.

§ 609. No findings required to support orders.

Findings are not required to be made to support orders. Proceedings which result in orders do not develop issues such as arise upon pleadings in an action, and to which findings are required to be responsive. In such a proceeding it is not incumbent upon the court to make and file express findings.[130]

§ 610. How conclusions of law stated.

Although the code provision that "the facts found and conclusions of law must be separately stated" appears to require that in addition to findings of facts, there shall be filed separate conclusions of law, yet, according to the practical construction given by the courts, the latter are of but little practical importance and may be omitted entirely without affecting the validity of the judgment. In other words, that part of the provision is treated as being merely directory. There appears to be no warrant for such construction; but it is one of those statutory requirements, an enforcement of which, to its logical end, would lead to the most glaring absurdities. If the court must in every instance state formally the legal principles which have been observed in applying the law to the facts, then, by analogy to the rules which govern findings, it must not only state all such legal principles, but must state them all correctly; otherwise the judgment must be reversed, or a new trial granted, because of erroneous views of the trial judge, even though the facts are correctly found and upon those facts the court has in practice applied correct principles of law in reaching the ultimate legal conclusion. And appellate courts have uniformly adopted the view which was thus tersely expressed by Justice Baldwin in Haffley v. Maier:[131] "The judgment was right on the undisputed facts, though a wrong reason was given for it. But we do not reverse for what we regard as bad logic, but for what we consider bad law." And in another case, where a reversal was sought because of inconsistency between findings and conclusions, the court said: "When some of the 'conclusions of law' in a decision are not properly drawn from the facts

130 Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639; In re Levison, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

131 13 Cal. 14.

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found, this is no ground for reversing the judgment if the ult mate conclusion upon which the judgment rests is not erroneou in view of the facts found. In such case the minor conclusion are at most but errors—erroneous deductions which do not i jure the party complaining of them."[132] And the view taken the earlier cases has been constantly adhered to.[133] In all su cases, though it be conceded that the court has erred in law, is error without prejudice; error which is cured by the rend tion of judgment for the proper party. As a mere matter of co venience it is well for the court to state the ultimate conclusi of law in the form of a direction that judgment be entered f such and such a party embodying relief to which he is entitle and that course is now usually followed.

§ 611. Changing conclusions of law.

Findings are of no legal effect until filed. The requireme is that the "decision must be given in writing and filed with t clerk." As has been shown in several connections, there is decision in actions tried by the court without a jury until t findings are filed, unless they be waived,[134] nevertheless, th the judgment is not void, without findings in the record a will withstand attack on appeal, except it be affirmatively sho that findings were not waived.[135] It follows that, since the is nothing which can be properly termed findings until th are filed, there is no limit upon the power of the court to chan them prior to filing them. With respect to the conclusions law, the question of whether a change is made before or af filing, is of no importance. Since the judgment is itself t only conclusion of law which is regarded as of any importan no change in any so-called conclusions of law made prior the entry of the judgment affords any ground for reversal, matter how radical the change or how conclusively or in wh form shown. When the judgment has been entered, any co clusions of law annexed to the findings are superseded. The

132 Davis v. Baugh, 59 Cal. 568, 576.

133 See Spencer v. Duncan, 107 Cal. 423, 427, 40 Pac. 459; Mil v. Hicken, 92 Cal. 229, 28 Pac. 339.

134 See ante, §§ 2, 360, 361.

135 See ante, §§ 684-686.

is, therefore, no such thing known to the practice as a proceeding to amend or set aside conclusions of law. The same thing is accomplished, however, by proceeding to set aside and vacate the judgment. The latter, however, could never be grounded upon error in the prior or ultimate legal conclusion which can only be available on appeal.

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CHAPTER 36.

BILLS OF EXCEPTIONS AND STATEMENTS ON APPEAL.

§ 612. Important function of bills of exceptions as part of the recor
§ 613. Methods of preparation and uses—Relation to "statement o appeal"—Statutory changes.
§ 614. Method of settling bills at the trial.
§ 615. Further as to bills settled at the trial.
§ 616. Further as to bills settled after the trial—Preparation an uses of.
§ 617. Either the one or the other method must be pursued.
§ 618. Bills of exceptions permissible on decisions of questions o law.
§ 619. Specifications.
§ 620. Method of taking and preserving exceptions.
§ 621. Bills of exceptions as part of judgment-roll.

§ 612. Important function of bills of exceptions as part o the record.

Though in treating of new trials more labor is devoted t and space occupied by bills of exceptions and statements, whic are practically the same thing under another name, yet suc bills are also the most important adjunct on appeal from th judgment, and usually so on appeals from orders, other tha those made on motion for new trial. Their importance as part of records on appeals has been greatly enhanced by code amend ments requiring them to be added to the judgment-roll, an by other modern code provisions for examining and passing up on the sufficiency of the evidence to support the verdict, or othe decision, upon appeal from the judgment, without a motion fo a new trial. Therefore, notwithstanding the incidental rep tition of several statutory provisions and legal principles, is deemed best to give a brief separate and special consideratio to the subject of preparation and uses of such bills in this plac with reference to the appellate proceedings in which they ar to be used.

§ 613. Methods of preparation and uses—Relation to "statement on appeal"—Statutory changes.

Bills of exceptions, like appeals from the judgment upon which they are to be used, are of statutory origin; and, as in the cases of appeals and new trials upon which they may be used, the proceeding which terminates in their completion, ready for use, is prescribed and governed by statutes. Such bills, differing, however, in form, use and in the time and manner of settlement, have always been a feature of practice in California. Herein, as was stated in the discussion of findings, a consideration and differentiation of the practice under the former system and the present becomes necessary, for the reason that while many of the decisions rendered prior to the adoption and amendment of the codes are still applicable, yet many of them are inapplicable. An explanation of these statutory differences may furnish a convenient test or guide in the examination and consideration of authorities; besides systems are found in other states similar in many respects to that formerly prevailing in California.

The only bills of exceptions provided for in the Practice Act of 1851 were those settled at the trial. The sole office of such bills was to present, on appeal from the judgment, questions as to errors occurring at the trial. But such bills were not the only method by which such errors could be presented. They could also be presented by statements on appeal; a method unknown to the present system. These bills and statements were very similar in resemblance and form, and their purpose was substantially the same, that is, the presentation for review of questions of law arising upon the matters therein set forth.[1]

The bill of exceptions is a simple and convenient method of preserving exceptions and bringing up the evidence on appeal, and is equally applicable to any and all kinds of appeals provided for by the code, and is to be preferred in practice to a statement of the case.[2]

[1] See Yates v. Smith, 40 Cal. 669.

[2] See Brant v. Clark, 81 Cal. 634, 22 Pac. 863. A motion for a new trial is not only unnecessary to authorize a review of rulings at the trial, but the much preferable practice is to take them up by bill of exceptions or statement on appeal: Cooper v. Pacific Mut. Life Ins. Co., 7 Nev. 116, 8 Am. Rep. 705.

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But there was one use which could be made of the stateme which could not be made of the bill. The former could be used appeal from orders other than orders on motion for new tri while the latter could not be so used. The bill had to be settl at and during the trial, while the statement could only settled after the trial. These were the only differences. A differences in form were disregarded by the courts.

Under the present system there are, as before stated, no sta ments on appeal, bills of exceptions settled after the trial ha ing taken their place. The other kind of bill, that settled and during the trial, a feature of the former system, is retain without material change either as to manner of settlement form. But they have a somewhat more extensive purpo They may not only now be used on appeal from judgments, also on motions for new trial, and on appeals from ord thereon.[3]

By an inspection of section 659, subdivision 2, in connecti with sections 649 and 650, it will be seen that bills settled d ing, as well as those settled after the trial for use on app from the judgment, may be used on a motion for new tr This feature was absent from the Practice Act. Then s thing as a bill of exceptions on motion for new trial was known; at any rate, not provided for. But the code makes provision for the use of either kind of bill on appeal from pealable orders; nor does it provide for bills of exception all on such orders. In this respect the Code of Civil Proced is defective as was the Practice Act.[4]

The bills settled after the trial are very similar in form manner of settlement to the statement on appeal which wa feature of the former system, but, like bills settled at the tr they may be used not only on appeal from the judgment on motion for new trial. Under the former system, neit could statements on appeal be used on the motion for new tr nor on appeal from the order thereon, nor could stateme on the motion be used on appeal from the judgment in absence of a stipulation to that effect.

3 See Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

4 Bills of exceptions on appeals from orders are now provided by rule 29 of the supreme court. See ante, § 460; post, §§ 624-

There is no material difference, either in the proceeding for settlement or in the form, between a bill settled after the trial and a statement on motion for new trial, settled before the hearing. But, whereas the use of the bill either on appeal from the judgment, or on the motion and any appeal which may be taken from the order thereon, or on both is without qualification or limit, such statement cannot be used on an appeal from the judgment, unless it has been actually or constructively used on the motion.[5] This latter proposition is subject, however, to an important exception. If the statement was settled within the time within which a bill of exceptions on appeal from the judgment might have been settled, the fact that it is called a statement will be ignored, although the proceeding for new trial may have been allowed to lapse.[6]

§ 614. Method of settling bills at the trial.

Under the code, as under the Practice Act, each exception is a separate paper authenticated by the judge and filed with the clerk. It is not to be entered in the minutes. The method is thus briefly explained in More v. Del Valle,[7] where the court said: "In this case as in many others, the entire minutes of the court are copied into the transcript. This is not proper, as we have often held. See Harper v. Minor, where we distinctly pointed out the proper practice. Exceptions taken during the progress of a trial under sections 188 and 189 of the Practice Act, whether, 'delivered in writing to the judge' by the counsel, or 'written down by the clerk,' should be written upon sheets of paper, settled and signed by the judge, and filed in the case; and when the judgment-roll is made up, attached to the judg-

[5] For a full discussion of this proposition and its qualifications, see ante, § 524, post, § 687.

[6] This rule fully discussed and authorities cited, chapter 22. A statement of the case, in North Dakota, settled in a civil action tried before a jury is governed by section 5467 of the Revised Codes, and not by section 5630. The latter section relates to cases tried before the court, while under the former only the substance of the evidence need be stated: Northern Pac. Ry. Co. v. Lake, 10 N. Dak. 541, 88 N. W. 461.

[7] 28 Cal. 170, 174. See, also, Wetherbee v. Carroll, 33 Cal. 553; Packard v. Bird, 40 Cal. 382; Harper v. Minor, 27 Cal. 107.

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ment-roll. The proper place for these exceptions is not in t minutes of the court, for they are to form a part of the jud ment-roll. When an appeal from the judgment is tak these bills of exceptions are certified up as part of the jud ment-roll, and not as copies from the minutes of the cour If the exception was not thus reduced to writing and settl by the judge, immediately upon the taking of the exception, could be brought before the court for review only by a statem on appeal, settled in the mode provided in the Practice Ac And this rule holds good as to bills settled at and during trial under the code, except that the thing which is sett after the trial is now a bill of exceptions rather than a statem on appeal, as formerly.

Bills of exceptions owing to the fact that they are settled thus explained, are not available for the purpose of obtain a review of any orders not made at and during the trial. S orders, except appealable orders, could only be reviewed, un the Practice Act, by means of a statement on appeal, and un the code may only be reviewed by means of a bill of exceptio settled after the trial, as directed in the code.[9] This was plained in Harper v. Minor;[10] and the language is still m applicable by merely substituting "bill of exceptions" "statement on appeal": "If an appellant desires to have intermediate orders affecting the judgment appealed from, not forming a part of the judgment-roll, reviewed, he must, means of a statement on appeal, bring them into the rec together with such facts forming the basis of the orders, as necessary to explain the action of the court below. It is this very purpose that the party is authorized by law to h a statement on appeal annexed to the record of the judgme or the order from which the appeal is taken." The requirem before terms of court were abolished by the constitution of 18 that the judge should sign the minutes at the close of the te did not authorize the entry of exceptions signed by the ju

8 Central Pac. R. R. Co. v. Pearson, 35 Cal. 247. See, also, Weinr v. Porteus, 12 Nev. 103.

9 Cal. Code Civ. Proc., § 650; De Pedrorena v. Hotchkiss, 95 C 636, 30 Pac. 787.

10 27 Cal. 109.

in the minutes. In Haraszthy v. Horton,[11] there was, in the record, no bill of exceptions, but the minutes of the court were brought up, containing the exceptions, and statements of evidence, and proceedings in connection with them, signed by the judge. The court refused to consider them, saying: "There is no bill of exceptions attached to the judgment-roll as found in the record. That portion of the transcript relied upon by the able counsel who argued the cause here for the appellant as a bill of exceptions, is not such—it is only an extract from the minutes of the clerk, signed by the judge in the due course of the proceedings of the court had from day to day during the term."

There was not, under the Practice Act, with reference to bills or statements, nor is there under the code, any requirement of a specification of errors where matters contained in a bill of exceptions, whether settled at or after the trial, are relied upon on appeal.[12]

§ 615. Further as to bills settled at the trial.

Several inconveniences are incident to the settlement of exceptions during the progress of the trial, in conformity with these rules. It is necessary to interrupt and delay all proceedings until the exception, and all the matters pertinent thereto are embodied in a writing which must be then and there settled and signed by the judge and filed. But, under the Washington code (where exceptions are required to be taken to findings of fact), it is held that if such exceptions were taken down by the court reporter, by order of the judge, instead of being noted in the margin, or at the foot of the decision, but by an oversight, are not attached to the findings or filed before the record on appeal is certified, it is within the power of the lower court to make a nunc pro tunc order directing the filing of such exceptions for the purpose of supplying the omission, and such exceptions are sufficient to secure a review of the evidence.[13]

[11] 46 Cal. 545. To same effect, United States v. Choctaw etc. Co., 3 Okla. 465, 41 Pac. 729; St. Croix Lumber Co. v. Pennington, 2 Dak. Ter. 475, 11 N. W. 497.

[12] See ante, §§ 423, 435, for explanation and authorities.

[13] See Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773; 2 Ball. Ann. Codes and Stats., § 5052. And it was held in Wyoming that

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Again there were as many bills of exceptions in the case there were exceptions taken during the trial.[14]

If, according to the California system, review is desired any nonappealable orders made prior to the trial a separate has to be prepared, settled, and filed after the trial.[15] It is at all strange that the practice of settling exceptions during trial has almost entirely disappeared, and that there are recent decisions involving questions relevant to such bills. provision of the Practice Act is still retained in the code, h ever, with no change calling for discussion, and is as follo "A bill containing the exception to any decision may be sented to the court or judge for settlement, at the time the cision is made, and after having been settled, shall be sig by the judge and filed with the clerk. When the decision

where it is stated in the certificate of the court constituting par the bill of exceptions that plaintiff excepted to a certain ruling, reservation of an exception sufficiently appears, though the jou entries incorporated in the bill do not show an exception: Sawi Pease, 6 Wyo. 91, 42 Pac. 750.

14 In Niagara Mining Co. v. Bunker Hill Min. Co., 59 Cal. is found an instance of three bills of exceptions settled during trial. It is permissible to have more than one bill when settled a the trial; as where orders and rulings have been made by more one judge in the same case: See Turner v. Hearst, 115 Cal. 394, 47 Pac. 129.

15 Gilman v. Bootz, 80 Cal. 564, 22 Pac. 255; Spence v. Scott Cal. 181, 31 Pac. 52, 939, applying rule to order striking out of answer; post, §§ 624-626. The second case was appeal from judgment, by one of the defendants. The court said: "It is cla that the court erroneously struck out certain portions of his ans and this is the only question which he seeks to present on this peal. Manifestly, the question cannot be presented without a of exceptions: Dimick v. Campbell, 31 Cal. 238; Douglas v. D 46 Cal. 49; Nevada County etc. Canal Co. v. Kidd, 43 Cal. 180; v. Shirley, 43 Cal. 369; Code Civ. Proc., §§ 670, 950. Indeed, decisions upon this point have been very numerous, commencing the first volume of the reports. The following are a few of t Gunter v. Geary, 1 Cal. 462; Griswold v. Sharpe, 2 Cal. 17; W v. Middleton, 2 Cal. 54; Castro v. Armesti, 14 Cal. 39; Dowle Hovious, 23 Cal. 103; Harper v. Minor, 27 Cal. 107; Mendocin v. Morris, 32 Cal. 145; People v. Empire G. & S. M. Co., 33 Cal. Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530; Gilman v. Boot Cal. 564, 22 Pac. 255; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 4

cepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by such tribunal or officer." [16]

An amendment made in 1876 was the insertion of the word "decision" for the word "ruling." Another was the insertion of the words "court or" before the word "judge." The last sentence of the section as it now stands was not in the section as the code was first adopted. It was added by the amendment of 1876.

§ 616. Further as to bills settled after the trial—Preparation and uses of.

Since bills to be used on appeal from the judgment settled after the trial and bills settled for use on motion for new trial, may be used interchangeably, and since the same bill may be used on both appeals, if embodied in the same transcript, it necessarily follows that their form is the same.

It is a feature common to all bills of exceptions, no matter when, or how, or for what purpose settled, that "the objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more"; that "only the substance of the reporter's notes of the evidence shall be stated," and that "documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them, may be made." [17]

Although section 649, providing for the settlement of bills during the trial does not prescribe the foregoing requisites, section 650 does; and it is applicable, in this respect, to all bills. With reference to the general form, bills settled at, and those settled after, the trial, necessarily differ somewhat, but are in substance the same, while as before stated, the latter and those to be used on the motion for new trial are the same. Consequently it is not necessary to repeat or reinsert here the ample discussion to be found under the proper head on the subject of new trials where all the requisites and proceedings for settlements of such bills may be found.[18] But as the record on ap-

[16] Cal. Code Civ. Proc., § 649.

[17] Cal. Code Civ. Proc., §§ 650, 659, subd. 3.

[18] See chapter 22, questions and differences in the matter of specification are there also discussed.

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peal from the judgment is the present matter for consideration and since the method of reviewing nonappealable orders on appeal from the judgment could not there be properly or relevantly considered, these subjects will be briefly discussed in this place. Such orders, when they affect the judgment, are reviewable on appeal from the judgment, and no separate record for that purpose is necessary, or permissible. But since such orders are often made after a hearing upon affidavits; or documentary or even oral evidence which form no part of the proceedings at the trial, these must also appear in the bill of exceptions settled after the trial, since there is no other method of having them examined in the appellate court. In Welsh v. Allen,[19] an appeal had been attempted from a nonappealable order, and the record presented was similar to that used on appealable orders. An objection on the ground that the order was not appealable was met with the insistence that the order was a final determination of the rights of the parties, and in effect a final judgment. The court did not pass upon the question of whether it might be so considered but in dismissing the appeal said: "The transcript before us does not contain a copy of the judgment-roll, or of a bill of exceptions, or of a statement in the case. If this were an appeal from a final judgment, and we had the judgment-roll before us, we could not consider any affidavits, unless they were embodied in a bill of exceptions, or statement settled in due form." And in Gilman v. Bootz,[20] the court, in affirming a judgment, said: "It is an essential component of the rule established by the foregoing decisions that the matter relied upon for review of an intermediate nonappealable order need not be presented to the court in any form, until the time is ripe for proceeding for the settlement of the bill to be used on appeal from the judgment." In Tregambo v. Comanche etc. Co.,[21] an order refusing to set aside a default was made prior to the entry of the judgment, and hence could only be reviewed as an

19 54 Cal. 211.

20 80 Cal. 563, 22 Pac. 255. To same effect, Douglas v. Dakin, 46 Cal. 651; Stoddart v. Burge, 53 Cal. 398; Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71, 47 Pac. 872.

21 57 Cal. 501, 504.

intermediate nonappealable order on an appeal from the judgment. Nevertheless, the defendant prosecuted an appeal both from the order of refusal and from the judgment. The record on appeal showed that, more than twenty days after the judgment, the trial judge had settled a bill of exceptions taken to the order refusing to set aside the default, and more than thirty days after the appeal had been taken the settled bill was filed. The court held that the only appeal it could consider was that from the judgment, which must be reviewed upon the judgment-roll alone, unless the bill of exceptions contained in the transcript could be considered as part of the record. This bill was attacked by the respondent on the ground that it was not presented for settlement at the time the order was made and excepted to. The court decided adversely to this objection, and after referring to and discussing sections 649 and 650 said: "It is contended, however, that section 650 refers only to exceptions taken at the trial of a cause, and not to exceptions taken in the course of proceedings before the trial has commenced; and that, as this was an exception taken to a decision rendered on a motion to set aside a default, it was not an exception taken 'at the trial.' Such an interpretation is one which seems to us to stick in the bark. A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial. Such an issue was presented on the application to set aside the default entered against the defendant. Upon that issue the court heard and determined; and to the decision rendered exceptions were taken, which were settled as exceptions taken at the trial in conformity to the provisions of section 650. The time prescribed by that section is made to relate to the settlement of bills of exceptions taken to any decision made before or after judgment; for it is provided by section 651 that exceptions taken to any decision made after judgment may be settled or noted as provided in section 649; but a bill of exceptions may be presented and settled afterward, as provided in section 650. The time for the presentation and settlement of all bills of exceptions is therefore fixed by section 650, and as the bill of exceptions in this case was

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presented and settled within that time, it constitutes a part the record of the case." This decision has been followed w approval in subsequent cases.[22]

§ 617. Either the one or the other method must be pursued.

The perfecting of a bill of exceptions, whatever the purp being purely a statutory proceeding, while either one or other of the methods provided by the code may be adopted secure its settlement, but no method which has not expr statutory sanction can result in a bill which the courts will c sider. Accordingly it was held that an ex parte bill of exc tions to the rulings of the court in passing upon the accou of a special administrator, in striking out certain items and ducing others, upon the objection of a creditor, which was settled at the time of the rulings, but was settled on the foll ing day, without service of any draft thereof upon the credi who was not present in person or by counsel at the settlem thereof, and did not agree to the same, could not be conside upon appeal from the order settling the account.[23]

22 See Pfister v. Wade, 59 Cal. 273; Flagg v. Puterbaugh, 98 134, 32 Pac. 863. The latter case is important and lays down for settlement of bills on appealable orders. It is given special c sideration, post, §§ 624-626.

23 Estate of Scott, 128 Cal. 579, 61 Pac. 98. The court, a setting forth the record appearing in the transcript and refer to the code and provisions, said: "The section contemplates settlement at the time the decision is made during the trial in presence of counsel for both parties. It does not contemplat settlement of the bill after the adjournment of court, and with any notice to adverse counsel. If such bill could be settled the n day, why not the next week, or month, or year. The code elsewh makes ample provision for the settlement of a bill of excepti after trial upon giving the adverse party notice and time to prep amendments so that the facts may all be accurately stated." Wetherbee v. Carroll, 33 Cal. 553, the court, consulting sections and 189 of the Practice Act which contained similar machinery the settlement of exceptions during the trial as is now contained sections 649 and 650 of the Code of Civil Procedure, said: "At trial both parties are present and in settling the exception can heard. Each party can see that every thing necessary to a prese tion of the entire merits on both sides is introduced. . . . . The pol of the act is that wherever there is a possibility that a partial

§ 618. Bills of exceptions permissible on decisions of question of law.

Orders are frequently made and decisions given, which may or may not result in judgments upon pure questions of law. But all such decisions rest upon facts. Even when the decision is upon a demurrer, it rests upon the fact that a pleading is presented to the court containing certain allegations and recitals. Strictly speaking, an exception can never be taken upon a decision of fact, a new trial being the appropriate method for review of such decisions.[24] It is true that when properly presented, the appellate court will review facts, and will reverse in case of an abuse of discretion. But in the last analysis, the question whether a court has abused its discretion is one of law. Upon this view has been founded the doctrine that there may be a trial of an issue of law, and a decision thereon, entitling the party against whom the decision is made to have a bill of exceptions settled and allowed, and the necessity of such bill in some such cases is obvious. Many orders are made and judgments rendered upon undisputed facts; that is, in rendering them, the court decides a question of law arising from admitted or uncontroverted facts. Without a bill of exceptions, an appeal from the order or judgment would be absurd, since, in the absence of the facts, the decision would be upheld by presumptions. Thus, in Tregambo v. Comanche etc. Co.,[25] the question presented upon a motion to set aside a default was whether certain acts constituted a filing of certain demurrers, the facts being undisputed. The court, in upholding the right to have an exception to the decision settled, said:

ord, for presenting a point, may be made, both parties shall have an opportunity to take part in settling it. And the two modes prescribed—one by settling the exception during the progress of the trial, in the presence of both parties, and annexing it to the judgment-roll; the other by a subsequent statement in the mode designated—afford an orderly and convenient mode of accomplishing that end": See, also, Kleinschmidt v. McAndrews, 4 Mont. 31, 5 Pac. 281, 2 Pac. 286; McKay v. Montana Union Ry. Co., 13 Mont. 15, 21, 31 Pac. 999; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

[24] The definition of exception is "an objection upon a matter of law to a decision," etc.: Cal. Code Civ. Proc., § 646.

[25] 57 Cal. 501, 505.

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[illegible]

of the ruling, and the words "we except" or "we save an exception" are but a renewal of the exception already taken. But courts take cognizance of the fact that many objections are made pro forma and as a matter of precaution for purposes having to do exclusively with the trial court, and that it often occurs that only a small percentage of the rulings made to evidence are relied upon on appeal. The true theory, however, of requiring a renewal of the objection in the form of excepting is to afford the court an opportunity to review, and reverse or revise its own ruling.

No specifications of errors of law are required in bills of exceptions, no matter when or how settled. This whole subject having been fully exploited elsewhere, its consideration will not be further proceeded with.[29]

§ 620. Method of taking and preserving exceptions.

The steps taken by counsel in an action or proceeding, for the preservation of points of attack upon the final determination, in view of the probability that it will, or possibility that it may be, adverse to their client, belongs more properly to a treatise on trials. But as it is a subject closely connected with the present, there is no doubt but that a few pertinent, and timely suggestions will be acceptable to all and highly appreciated by many.

The rule that error or abuse of discretion—which is really a species of error—will never be presumed, but must be affirmatively shown, lies at the foundation of the whole scheme of appellate procedure. All the statutory provisions for exceptions, bills of exceptions, and statements is projected upon this rule, and is designed to facilitate the exercise of the right to a review, and at the same time, protect the party against whom the appellate proceeding is instituted and prosecuted against deception, mistake and the commission of new errors in an attempt to correct any real or supposable errors that are complained of.

As before explained, there can be no decision entitling a party to an exception, unless there be a basis of fact presented in the course of the trial, or in the procedure leading up to the trial, calling for a decision; and when the decision is made, it is one

[29] See ante, §§ 423, 435.

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of a legal question. Whether the decision, when made, be c rect or erroneous, will depend upon the character of the s structure of fact.

Where an exception is required to be taken, the record m show that it was in fact taken, and that it was taken in pro order with reference to other proceedings.[30] But thoug party acquiesce in a ruling when first made, he is not ther estopped from excepting, if the same ruling should be sub quently repeated.[31]

Sometimes the party upon whom the right or duty to exc devolves must take other action with a view to excepting. Th if he believes that evidence offered against him is inadmiss for any reason, or for several reasons, it behooves him to st all his objections with sufficient distinctness and fullness t the court may not mistake their point, and may be able at o to refer them to the applicable rule of evidence. So if he lieve, after the voir dire examination of a juror, that it closes a ground of challenge for cause, care must be taken base the challenge upon the specific ground or grounds of qualification which most strongly support the challenge, in or that any exception to the ruling of the court on the challe may be effective on appeal or on motion for a new trial. other instances, and in the presence of other conditions, he n only except. For instance, he need only except to an or when made, it being other than one, an exception to which excused by the statute. He need only except to an instruct given or refused. If he offer evidence and it be ruled out objection of the opposing counsel, he merely saves an excepti

It was once supposed in California that upon trials by court without a jury exceptions were necessary in order t the losing party might avail himself of error of the court

30 See Froman v. Patterson, 10 Mont. 107, 24 Pac. 692. Evide given by jurors when examined upon their voir dire may be exclu from the bill of exceptions, unless exceptions are reserved to ruling of the court, on the admission or rejection of evidence on trial of the challenge: People v. Goldenson, 76 Cal. 328, 19 Pac. 1 As to sufficiency of exception, see Randall v. Burk Tp., 4 S. D 337, 57 N. W. 4; Alt v. Railway Co., 5 S. Dak. 20, 57 N. W. 11 Calkins v. Seabury Min. Co., 5 S. Dak. 299, 58 N. W. 797; Illstad Anderson, 2 N. Dak. 167, 49 N. W. 659.

31 See Lawrence v. Ballou, 37 Cal. 518, 521.

the application of legal principles to the evidence in reaching the ultimate decision, though no opportunity had been presented to save an exception during the trial or hearing. Thus, in Touchard v. Crow,[32] the court suggested that, when a case was tried by a court without a jury, if counsel desired certain points of law to be considered as applicable to the facts established, the proper course would be to present them in the form of propositions. In an earlier case,[33] a similar course had been suggested as the proper practice. And, strange to relate, notwithstanding many intervening expositions of the true function of an exception, and of the correct practice for review of decisions against evidence, and of abuses of discretion in making orders, a failure to take that course was strongly intimated as a ground for a refusal to consider a specification of insufficiency of evidence, in a case arising subsequently to the adoption of the codes,[34] although the case was reversed upon another ground. In Wilson v. Wilson,[35] some similar suggestions were made, but no such question was decided by the court, or pressed for decision. But in Lamb v. Harbaugh,[36] the defendants, at the close of the testimony, presented to the court certain propositions which they requested the court to declare as legal principles, applicable to the facts of the case, and to render its decision in accordance therewith. Upon the refusal of the court so to rule, they took exceptions, and carried the whole matter to the supreme court by bill of exceptions, The court treated the points thus presented with due, or rather undue, seriousness, and after referring to the fact that in New York, and perhaps some other states, such a practice was authorized by statute, and that it was unauthorized by the Code of Civil Procedure, proceeded as follows: "There is no express provision to that effect, and the provision that the decision of the court may be reviewed through exceptions taken to its rulings upon the admission of evidence during the trial, or through an exception to the decision itself, either on the ground of insufficiency of evidence or disregard of law, affords to the losing party ample

32 20 Cal. 150, 81 Am. Dec. 108.

33 Griswold v. Sharpe, 2 Cal. 23.

34 Estate of Page, 57 Cal. 239.

35 64 Cal. 92, 27 Pac. 861.

36 105 Cal. 680, 692, 39 Pac. 56.

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opportunity for securing a proper consideration, by the trial court in the first instance upon a motion for a new trial, or by this court upon an appeal, of all the principles of law applicable to the facts of the case. If the facts found by the court do not under any principle of law sustain the judgment, this can be shown on appeal without any bill of exceptions setting forth the failure of the trial court to make application of the proper legal principles; and, if its decision upon any controverted question of fact results from a failure to properly apply the law applicable thereto, or from a consideration of evidence not entitled to be considered, this error can be reviewed through a bill of exceptions in which is specified such error of law, or that the evidence is insufficient, either by reason of its incompetency or irrelevancy, to sustain the decision."

§ 621. Bills of exceptions as part of judgment-roll.

Bills of exceptions belong to the judgment-roll, whether settled at the trial or afterward.[37] And in Montana, where statements on appeal are in use, the statement is part of the judgment-roll.[38] And it is of no consequence in this respect that at the time of settlement the judgment-roll has been made up. It is the statutory direction and not the mere act of putting the papers together that make any designated paper a part of the roll. This question was settled with reference to a bill settled and filed after the judgment-roll was made up in Caldwell v. Parks.[39] An objection to a consideration of the bill was taken in the supreme court by the respondent, who claimed that it could not be considered as forming part of the record because it was not taken and settled at the trial, when the rulings therein complained of were made. But the court construed the sections of the code bearing on the question and reached a conclusion adverse to the construction of counsel, saying: "The argument made in support of the objection is rested upon sec

37 Cal. Code Civ. Proc., subd. 2. See Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92, holding that in the absence of a bill of exceptions embodying the notice of motion to strike out a pleading, the motion and order of the court refusing such motion do not become a part of the judgment-roll under this section.

38 Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969.

39 47 Cal. 640.

tion 950 of the Code of Civil Procedure, which provides that on an appeal from a final judgment, the transcript shall consist of a copy of the notice of appeal, the pleadings, the judgment, and such other parts of the judgment-roll as are necessary to present the points relied upon for reversal; and it is claimed that unless the bill of exceptions had properly become part of the judgment-roll, it cannot constitute part of the record upon appeal from the judgment, and that, inasmuch as the clerk is required, by section 670, of the Code of Civil Procedure, to make up the judgment-roll immediately after the entry of judgment, no bill of exceptions, not then already, 'taken and filed,' can be considered to form part of it. Our attention is also called to the fact that the Code of Civil Procedure contains no provision allowing bills of exceptions to be annexed to the judgment-roll, corresponding with section 338 of the late Practice Act providing that statements on appeal might be so annexed. We think, however, that this construction of the code cannot be maintained, in view of section 650, already cited. There is no doubt that that section provides for the settlement of bills of exceptions, based upon errors of law occurring at the trial of the cause, and this may be done after entry of judgment, and after the judgment-roll has already been made up by the clerk, under the provisions of section 670. But if the position of the respondent be correct, such bills of exception would be unavailing for any purpose, except, perhaps, that of a motion for a new trial. In other words, a party relying upon errors of law for the reversal of the judgment would be compelled, in every instance where his bill of exceptions was filed only after the entry of judgment, to resort to a motion for a new trial in the court below, before he could present such errors for review in this court? The code was designed to simplify proceedings on appeal, and to facilitate the review of questions adjudged in the trial courts. Now, under the practice lately prevailing, it never was required, though it was permitted, that a party who complained of errors of law should move for a new trial in the court below before bringing an appeal to this court. It was never supposed that it was necessary to show that the court below had committed the same error of law twice, before it could be made a subject of review in the appellate court, and we do not think that such an inconvenient rule of practice has been promulgated by the Code of Civil Procedure."

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CHAPTER 37.

RECORD ON APPEALS FROM ORDERS.

I. Intermediate Orders and Special Orders Made After Final Judgment.

II. Orders on Motion for New Trial.

I. INTERMEDIATE ORDERS AND SPECIAL ORDERS MADE AFTER FINAL JUDGMENT.

§ 622. General view of subject.

§ 623. Statutory changes.

§ 624. Further as to bills of exceptions on appeal from orders.

§ 625. Time and manner of settling the bill under rule 29.

§ 626. Use of bills of exceptions for purposes of identification.

II. ORDERS ON MOTION FOR NEW TRIAL.

§ 627. The statutory designation of essential record on appeal.

§ 628. When additional bill of exceptions necessary.

§ 629. Statement and bill of exceptions compared.

§ 630. Extent to which statement on motion for new trial may be used on appeal from judgment.

§ 631. Identification of affidavits where motion for new trial made and heard on the minutes.

§ 632. How proceedings subsequent to hearing of motion shown.

I. INTERMEDIATE ORDERS AND SPECIAL ORDERS MADE AFTER FINAL JUDGMENT.

§ 622. General view of subject.

Of the many orders which may be made after the filing of the pleading by which an action or proceeding is instituted, some are appealable, while some are not; that is to say, it is provided by statute that the action of the court in making some orders may be reviewed by means of a separate appeal, upon a separate record, without waiting for a final determination of the issues raised by the pleadings, while others can only be reviewed upon appeal from the judgment, or from an order on motion for

new trial. These orders from which a separate appeal lies as subjects of appeal, have been already discussed from that point of view.[1]

The reasons for discriminating between orders, with reference to the mode of review, need not be discussed, since, without statutory authority, no separate appeal could be taken, and the statutory designation places the question beyond the range of profitable discussion. It may be properly suggested, however, that the discrimination is not made exclusively along the line of relative importance of orders, but seems to have been prompted, as well, by the feasibility of fully disposing of the questions involved, without reference to the chief merits of the action, notwithstanding that some of the appealable orders do have a far-reaching effect upon the ultimate decision. But the above suggestion has reference only to what are known as intermediate orders, that is, orders made before judgment. There is no distinction with respect to appealability as to special orders made after the entry of judgment. All such are appealable, as has been shown.[2]

§ 623. Statutory changes.

In no branch of practice has there been more difficulty experienced in understanding the meaning and effect of statutory provisions, and changes therein, than in the case of appeals from orders, and the mode of presenting for review the questions involved in making them. The shortcomings of legislators and codifiers are responsible for this, to a great extent. But about all the important matters, as to which controversies have arisen in the past, have been at length settled, largely by adjudications, partly by rules of the supreme court. Little remains in addition to a presentation of the rules established by statutes as construed, and those made, by the court. Still, it will conduce to a readier understanding of these, if some of the changes made in the statutory provisions and their effect are explained.

The Practice Act of 1851, as amended in 1854,[3] made a different provision for the record on appeal from an order, where

1 See chapters 25, 26, 27.

2 See chapter 27, especially § 517.

3 See Laws 1851, p. 105; Laws 1854, p. 64.

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affidavits were used, from that to be used if the matter relied upon to reverse the order was oral evidence, or other documentary evidence than affidavits. In the former case, a statement on appeal containing such other matter had to be annexed to the order, just as was done prior to the adoption of the code, on appeal from the judgment, if no bill of exceptions had been made up and settled at, and during, the trial.[4] If the matter solely relied on for a reversal was contained in affidavits, no statement was required.[5] As construed by the supreme court, not only affidavits, but other papers on file, for instance, the complaint, could be brought up if properly identified as having been used at the hearing, without a statement. But where other evidence was exclusively relied on, or other evidence additional to affidavits and files of the court, there had to be a statement containing such other evidence.[7] Bills of exceptions were unknown to the practice in appeals from orders.[8]

The Code of Civil Procedure, as first adopted, made no provision for statements for any purpose whatever. It merely provided,[9] in the case of new trials, that the application should, when made upon certain grounds, be made upon "bills of exception, on file."[10] It did not require bills of exceptions in every case. In section 951, relating, as in the present code, to appeals from judgments rendered on appeals, and from orders, it was provided that the appellant should furnish the appellate court with "a copy of the notice of appeal, the judgment or order appealed from, and of the bill of exceptions relating thereto." The bill could not be dispensed with, even when the order was based exclusively upon affidavits."[11]

4 This statement on appeal was provided for by section 338 of the Practice Act.

5 See section 343 of Practice Act as amended in 1854.

6 See Gagliardo v. Crippen, 22 Cal. 362.

7 See Haggin v. Clark, 28 Cal. 163; Cross v. Zane, 45 Cal. 82.

8 Wetherbee v. Carroll, 33 Cal. 549, 556.

9 § 658.

10 Kelly v. Larkin, 47 Cal. 58.

11 So held in Grozidal v. Bastanchure, 47 Cal. 167, where the appeal was from an order opening a default made on affidavits. See also, Jacks v. Buell, 47 Cal. 162.

By amendment in 1874, section 951 was changed to its present form. The words "and of the bill of exceptions relating thereto" were omitted, and the words, "and of papers used on the hearing in the court below," substituted.

§ 624. Further as to bills of exceptions on appeal from orders. It will be observed that, after the amendment last noticed, no express authority is found in the code for resort to a bill of exceptions on appeal from an appealable order, made intermediately. Whether the omission was an oversight, or it was considered that the authority for them was conferred by implication, drawn from sections other than 951, need not be discussed. At any rate, none are expressly authorized; but they are not forbidden. Their use is now sanctioned and required by a rule of court, which reads as follows: "In all cases of appeals to this court, from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."[12] The rule is not enforced beyond its purpose. It is only intended to apply to those appeals in which the order is sought to be reversed because of matters alleged to be shown by affidavits or evidence taken upon the hearing in the trial court, and does not apply when the order appealed from is attacked for matters appearing upon its face, or upon the face of the record of which it forms a part.[13] And al-

12 Supreme court rule 29 adopted in 1892, and appears in the rules published in 130 Cal., pp. xxxv to xlix, inclusive. Prior to 1896, this was rule 32. See, also, Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080; Smith v. Jordan, 122 Cal. 68, 54 Pac. 368. Facts on which the judgment and a prior order were based cannot be included in statement of facts on appeal from order refusing to open judgment: State v. Superior Court (Wash.), 70 Pac. 102.

13 Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639. The opinion in this case contains valuable distinctions and suggestions and is, in part, as follows: "The respondents have made a preliminary motion to dismiss the appeal upon the ground that the papers contained in the transcript are not authenticated by a bill of exceptions as required by rule 32 of this court. Section 951 of the Code of Civil Procedure makes it the duty of a person appealing from an order to furnish this court with a copy of the order appealed from, and

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though it is perhaps permissible, and is a frequent practice to incorporate the judgment-roll, or portions thereof which h been used at the hearing of a motion, in the bill, that is u necessary. These may be identified by the certificate of t clerk, just as he would certify to the roll on an appeal fr the judgment.[15] And since the judgment-roll is not made

copies 'of papers used on the hearing in the court below,' and r 32 of this court provides that such papers or evidence must be a thenticated by a bill of exceptions, when no other mode of authen cation is provided by law. This rule was only intended to apply those appeals in which the order is sought to be reversed, becau of matters alleged to be shown by affidavits or evidence used or tak upon the hearing of the court below. Such was the case of Wh v. White, 88 Cal. 429, 26 Pac. 236, cited by respondents. But a f interpretation of its language, as well as a consideration of object, will show that this rule of the court can have no applicati when the order appealed from is attacked for matters appeari upon its face, or upon the face of the record of which it forms part. The settlement of the accounts of an executor or administrat though sometimes spoken of as an order, is in effect a judgme and it was held in the Estate of Page, 57 Cal. 238, that in a p ceeding for the settlement of such an account 'the petition and count, and the written objections filed to it are the pleadings wh the clerk of the court is required to attach to a copy of the ju ment (Code Civ. Proc., § 670), and these constitute the judgme roll'; and to the same effect is the earlier and well-considered c of Estate of Isaacs, 30 Cal. 106; and while in such a proceeding is not incumbent upon the court to make and file express findin still, when the account is assailed in any particular for matt not appearing upon its face, the court may properly make expr findings upon such issues, as was done in the Estate of Moore, Cal. 522, 31 Pac. 584, and when it does so such findings become much a part of the judgment-roll as the judgment or order itself, the account and exceptions thereto which constitute the pleadings the parties. If the findings in this case are to be regarded as a p of the judgment-roll, as we think they must, then every objecti urged by the appellants to the order appears upon the face of t judgment-roll, and in such a case a bill of exceptions has no off to perform, its only purpose being to make that matter of rec which would not otherwise appear as such. The record here bei sufficient to present the questions raised by the appellants upon t appeal, the motion to dismiss the appeal must be denied."

14 As was done and sanctioned in Reddington v. Cornwell, 90 C 49, 27 Pac. 40.

15 Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639.

until after final judgment has been entered, it is usually impracticable to bring up the entire judgment-roll on appeal from interlocutory judgments, or intermediate orders, nor is it necessary.[16]

The same rule is in force in Montana as in California. The proper method of preserving and presenting exception on appeal from orders is by bill of exceptions.[17] In South Dakota, affidavits

16 See Emerick v. Alvarado, 64 Cal. 529, 541, 2 Pac. 418. The court in this case said: "It is further urged that the appeal should be dismissed because the entire judgment-roll is not brought up. Conceding that on an appeal from an interlocutory judgment in partition, the entire judgment-roll, so far as it exists, is to be and can be brought upon on the transcript on appeal, we remark that it is not the practice of this court to dismiss an appeal under such circumstances, when the defect can be readily cured on a suggestion of diminution. It is clear, however, that on such an appeal no judgment-roll has been made up. No final judgment has been rendered, and until final judgment has been made and entered, the judgment-roll is not and cannot be required to be made: Code Civ. Proc., § 670. Before the postea and entry of judgment, according to what is known as the common-law procedure, the roll was known as the issue roll, or nisi prius roll; after the entry of judgment it was called the judgment-roll: Boote's Suit at Law, 136, 142, 143; Stephen's Pleading, 81; Abbott's Law Dictionary, verba, 'Judgment Record or Roll,' citing Smith's Action at Law, 184. This, however,, applied only to cases at law. No judgment-roll was known in courts of equity. The pleadings, process, depositions, orders of all kinds, upon being filed, and final decrees when enrolled, in cases in chancery, went into and constituted the record. The case before us, although courts of law had at an early period jurisdiction in cases of partition. (1 Story's Equity Jurisprudence, 646-648), partakes more of a case in equity.. However, it is sufficient to say, that no judgment-roll is provided for by the procedure in this state until final judgment has been entered, and we do not see why the requirement contended for here should obtain. The appeal should not be dismissed on the ground referred to, and the motion is denied. If any party had desired any paper to be brought up, which would constitute a part of the record in the case when the roll is made up, and would be material on the examination and decision of the cause, on a suggestion or motion to that effect, leave would have been granted."

17 Harding v. McLaughlin, 23 Mont. 334, 58 Pac. 865. Held, however, in Parrott v. McDevitt, 14 Mont. 203, 36 Pac. 193, that no bill of exceptions is necessary to bring up for review a ruling on a motion to direct the clerk to enter a judgment nunc pro tunc as of the day of its rendition. Since the first day of July, 1895, when

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will be considered, if properly identified, though not contain a bill of exceptions.[18] It also appears that other means of i tification are sufficient in Idaho.[19] Though it is not o tionable to specify errors on appeals from orders, yet it i necessary to do so.[20]

The supreme court rule above quoted is broad enough t clude all appealable orders, whether made before or after judgment. Even without it, bills of exceptions are require appeals from special orders made after final judgment by tion 651 of the Code of Civil Procedure. An appeal from an order, without a bill of exceptions, must be disregard

§ 625. Time and manner of settling the bill under rul

It will be noted that the foregoing rule was silent as t time and manner in which the bill should be settled. Tw of opinions were previously entertained and followed o practice: 1. That the settlement should be made at the he of the motion as bills are settled at the trial, according t provisions of section 649; 2. That the settlement shoul made as bills are settled after the trial, under the prov of sections 650 and 651 of the Code of Civil Procedure. though bills settled by each of the above methods had been in the supreme court upon various occasions, without obj being raised, still, the legal and proper method to be pu as well as the proper time for the settlement, were questi unsettled, as before the rule. This condition of uncer continued until the decision in Flagg v. Puterbaugh.[22] conclusion clearly deducible from the opinion of the co

the Code of Civil Procedure went into effect, the statutes of tana no longer provide for or recognize a "statement on ap as a means whereby matters not part of the record proper m come parcel of the judgment-roll.

18 Bedtkey v. Bedtkey, 15 S. Dak. 310, 89 N. W. 479. See v. Scott, 1 S. Dak. 337, 47 N. W. 286, to same effect.

19 Thiessen v. Riggs (Idaho), 51 Pac. 107; Warren v. St (Idaho), 59 Pac. 540.

20 Hunt v. Steese, 75 Cal. 620, 17 Pac. 920.

21 Williamson v. Johnson, 137 Cal. 151, 69 Pac. 980.

22 98 Cal. 134, 136, 32 Pac. 863. See, also, Smith v. Jorda Cal. 68, 54 Pac. 368.

Chief Justice Beatty in that case is, that either of the above-mentioned methods may be adopted. The court said, in part: "A court should lean in favor of giving to litigants every reasonable opportunity of presenting their case on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction. Taking this view of the matter, and assuming that the case is governed by section 649, that section is in terms permissive, and the privilege granted the party of presenting his bill of exceptions for settlement at the time of the ruling is not necessarily exclusive. It would frequently be extremely inconvenient to make up a bill of exceptions instanter, and there is no reason why a court should hold itself rigidly bound to such a practice in the case of appealed orders made before final judgment, any more than in the case of similar orders made after final judgment, which are provided for in section 651. In short, we think that in a case falling under section 649, a bill of exceptions ought to be settled and allowed, if presented within a reasonable time after the order excepted to, and that the analogy furnished by section 650 and 651, should determine what is a reasonable time. The petitioner here followed the practice prescribed by those sections, and was entitled to have his bill of exceptions allowed and certified. It is only in consequence of our twenty-ninth rule that a bill of exceptions to this order is necessary. The rule does not, as perhaps it ought, prescribe any practice for the settlement of the bills of exceptions which it requires. We take the occasion, therefore, to say, that, in order to comply with that rule, parties appealing from orders may follow the same practice prescribed by section 650 and 651 of the Code of Civil Procedure." Certainly, no criticism can be made upon the soundness of the views thus expressed. But there is some room for doubt, whether any rule of the supreme court was ever necessary to authorize bills of exceptions on appeals from intermediate orders. The court does not say in this case that they are not, in the absence of said rule, permissible, but that it "is only in consequence of our twenty-ninth rule that a bill of exceptions is necessary." Even if it had been conceded in the opinion that the method prescribed in section 651 for the settlement of bills after trial

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was inapplicable, yet, neither that section nor any other
tains anything exclusive of the right to a bill on appeal f
an order, unless it be an implication arising from section
It must be assumed that the legislature was aware that m
motions resulting in appealable orders are heard on oral
dence. It is also reasonable to suppose that it had in m
the power of the courts to prescribe an appropriate method
the exercise of jurisdiction, whether appellate or original,
the absence of a statutory mode. The fact that, prior to 1
there was no rule requiring bills of exceptions is of no
portance on the question of whether the bill, as a means of
taining a review was permissible, nor is the fact that the
requires a bill to be used, since the court may adopt or rat
as well as prescribe an appropriate method, as it has often d
In Pieper v. Centinela Land Co.,[23] the court, speaking as
the sufficiency of the identification of papers brought up in
transcript, said: "Under such circumstances, this court has
power to prescribe, by a rule, how such papers can be brou
before it on appeal. This it can do in order to make effect
the appeal given by law. As it has such right to make a
in advance, it has like power to ratify and adopt the mode
lowed in this case."[24]

§ 626. Use of bills of exceptions for purposes of identificati

The code adds nothing to the designation of the papers
be used on the appeals mentioned in section 951, as a guid
the identification of papers in the supreme court. It merely
rects that "the appellant must furnish the court with a c
of the notice of appeal, of the judgment, or order appe
from, and of papers used in the hearing in the court belo
Orders made after judgment are included, and orders on
tions for new trial are mentioned in the section 952.

But the question of identification of papers on appeal fr
the latter orders is elsewhere considered.[25] The present cons
eration relates exclusively to appealable intermediate orders a

23 56 Cal. 173.

24 But the inability of the court to adopt, or ratify in conf
with a statute, or where there is a statutory method in force, m
not be overlooked: See ante, § 466.

25 Ante, § 624.

special orders made after final judgment. But it must be again mentioned at this place that methods are expressly provided by statute for identification of documents on appeal from orders after judgment, and on motion for new trial, while, as to intermediate appealable orders, the condition, in so far as it relates to the method of presentation of facts in the appellate court, is as here stated. The case of Pieper v. Centinella Land Co.[26] was the first in which this question of identification arose after the amendment of 1874, striking out the provision for a bill of exceptions in section 951. That was on an appeal from an intermediate order denying the defendant's motion for a change of the place of trial. No bill of exceptions was presented, nor were the papers in question marked in any way for identification by the judge. But, at the end of the transcript, in which they were inserted, was the certificate of the judge, expressly referring to the papers as having been used on the motion, and this was held sufficient identification. This decision was followed and appeared in several subsequent cases.[27] There are dicta in one or two cases in criticism of that decision; dicta, because uttered in cases in which the statute provides other means of identification. The cases in which the criticisms occur antedate the adoption of the supreme court rule requiring that "the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." One of the cases last referred to was Herrlich v. McDonald,[28] an appeal from an order made after judgment, to wit, a refusal to recall an execution; the other was Somers v. Somers,[29] also an appeal from an order made after judgment, to wit, an order awarding counsel fees. But, as before stated, a bill of exceptions is provided for on such appeals by section 651.

26 36 Cal. 173.

27 Clark v. Crane, 57 Cal. 634; People v. Jordan, 65 Cal. 648, 4 Pac. 683; Cummings v. Conlan, 66 Cal. 413, 5 Pac. 796, 903; Schammel v. Schammel, 70 Cal. 73, 11 Pac. 497.

28 80 Cal. 472, 476, 22 Pac. 299. See, also, Smith v. Jordan, 122 Cal. 68, 54 Pac. 368.

29 81 Cal. 608, 22 Pac. 967.

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The entire controversy involved in those cases must be co sidered to have been set at rest by the adoption of the sa rule. The rule must be considered exclusive, except where motion for new trial is heard on the minutes of the court.

It is now well settled that, on all appeals from orders, e cept from orders made on motions for new trial on the mi utes, all papers used at the hearing in the court below, whi it is desired to have considered on appeal must be authentica (identified) by incorporating them in a bill of exceptions.[30]

30 See San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 P 299; White v. White, 88 Cal. 429, 26 Pac. 236; Somers v. Somers, Cal. 608, 22 Pac. 967; Linott v. Rowland, 119 Cal. 452, 51 Pac. 6 La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765; Herrlich v. McDona 80 Cal. 472, 22 Pac. 299; Spreckels v. Spreckels, 114 Cal. 60, 45 P 1022; Adams v. Andross, 85 Cal. 609, 24 Pac. 842. As to identifi tion on appeal from order made on motion for new trial on minut see post, §§ 628-632. The correct practice at present is very clea stated and explained in the first case cited above, as follows: "T appeal from the order must be heard upon the papers used on hearing in the court below. By section 951 of the Code of Ci Procedure it is provided that 'on appeal from a judgment rende on an appeal, or from an order, except an order granting or ref ing a new trial, the appellant must furnish the court with a c of the notice of appeal, of the judgment or order appealed fr and of papers used on the hearing in the court below.' Rule of this court (formerly rule 32) provides how the papers are to authenticated, and is as follows: 'In all cases of appeal to t court from the orders of the superior court the papers or evide used or taken on the hearing of the motion must be authentica by incorporating the same in a bill of exceptions, except when other mode of authentication is provided by law.' The case h comes under rule 29, and unless we can say that the papers evidence used at the hearing are properly authenticated we can consider the bill of exceptions. The decisions above referred hold, and the language of the rule is, that the papers and evide used at the hearing 'must be authenticated by incorporating same in a bill of exceptions'; and this means, must be set forth and made a part of it. The bill of exceptions taken on the hear of a motion such as the present one is entirely distinct from judgment-roll, and is intended to be complete in itself for its o purposes. The bill of exceptions certified as settled by the ju refers to fourteen different papers and documents as used at hearing, not one of which is incorporated in the bill. The o authentication of the notice of the motion and attached affidavit

It is well settled that no bill of exceptions is necessary to set forth any paper forming part of the judgment-roll, where the latter is also essentially a part of the record on appeal. A different question is presented, however, where the appeal is from an order based in part on matters in the judgment-roll, and partly on other documentary or oral evidence. There is no doubt but in that case the paper might be embodied in the bill of exceptions, but that it might be sufficiently identified by the clerk's certificate.[31]

Littlefield, which is essential to the consideration of the motion, is by stipulation of counsel. Similarly they authenticate, by stipulation, the correctness of the judgment-roll, and add that 'the indorsements of admission of service and file-marks of all said documents are correctly stated.'—this probably for the purpose of aiding this court to identify them. But the judge alone is authorized to authenticate the papers used at the hearing, and this must be done by incorporating them in the bill of exceptions. Appellants seem to contend that giving a brief description of the character of a paper, its date, date of filing, and the name of the person making the affidavit (where an affidavit is the paper) is sufficient if, upon an examination of the transcript, a particular paper can somewhere be found answering the description and no other can be found fitting the description. And it was upon this theory, apparently, the judge was asked to settle the bill. He followed the stipulation of counsel, but the stipulation was, that the skeleton form used should be settled and allowed, plaintiff 'reserving all exceptions and objections,' and the judge settled the bill as thus presented without, as we have seen, authenticating a single paper referred to in it. We are asked to say that the papers and evidence need not be incorporated in the bill of exceptions, but that it is sufficient if they be so earmarked that they can be identified in the transcript by reference to the catalogued list of papers in the bill and by a comparison of them with like papers found in the transcript. The court rule was intended to remove all doubt as to what papers were read to the court at the hearing of the motion, by requiring them to be incorporated in the bill. This court cannot, under the rule, be asked to search through the transcript to discover papers referred to in the bill of exceptions only by some general description or by their dates and dates of filing. Aside from the labor entailed upon the court by this method, it would lead to uncertainty and doubt often as to the papers intended to be included in the bill, and would lack that certainty of authentication which must come alone from the judge who hears the motion.''

[31] Miller v. Lux, 100 Cal. 609, 613, 35 Pac. 345, 639; Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231.

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The mere fact that a paper is on file cannot dispense wit insertion in the bill.

It was held in Sharon v. Sharon,[32] that documentary dence was sufficiently incorporated in a bill of exception being annexed thereto as exhibits, pursuant to a stipula of counsel, being also referred to in the bill. That deci however, was prior to the adoption of the supreme court r and is in direct conflict with the decision in the recent ca San Diego Savings Bank v. Goodsell,[33] where, in the opi the court, after citing authorities, said: "The decisions a referred to hold, and the language of the rule is, that the pers and evidence used at the hearing 'must be authentic by incorporating the same in a bill of exceptions'; and means must be set forth in, and made a part of it."

II. ORDERS ON MOTION FOR NEW TRIAL.

§ 627. The statutory designation of essential record on peal.

On every appeal from an order on motion for new the judgment-roll is an essential part of the record. The fornia code provides as follows: "The judgment-roll and affidavits, or bill of exceptions, or statement, as the case be, used on the hearing, with a copy of the order made, constitute the record to be used on appeal from the granting or refusing a new trial, unless the motion be r on the minutes of the court, and in that case, the judgm roll and a statement to be subsequently prepared, with a of the order, shall constitute the record on appeal."[34] It ther provides, "On appeal from an order granting or refu a new trial, the appellant must furnish the court with a of the notice of appeal, of the order appealed from, and o papers designated in section 661 of this code."[35] It wi seen that there is an inconsistency with reference to the n of appeal which is omitted from the enumeration in the

32 79 Cal. 633, 22 Pac. 26, 131.

33 137 Cal. 420, 70 Pac. 299.

34 Cal. Code Civ. Proc., § 661.

35 Cal. Code Civ. Proc., § 952.

section above quoted and included in the second. There is also a duplication with reference to the order. Nevertheless, the notice is undoubtedly an essential part of the record, equally with the order.[36] The judgment-roll is equally essential. In a case where it was omitted, the court dismissed the appeal.[37] But, by proper steps, the judgment-roll may often be abridged.[38]

§ 628. When additional bill of exceptions necessary.

Under the operation of the supreme court rule, an additional bill of exceptions is required in every case of appeal from an order on motion for new trial made on a bill of exceptions prepared before the hearing, in connection with affidavits; namely, the bill prepared and settled at or after the hearing and embodying the affidavits used on the motion.[39] Likewise, if the motion be made on a statement previously prepared and affidavits, a bill of exceptions embodying and identifying the affidavits or other evidence, must supplement the statement.[40] These additional or supplemental bills may be prepared and settled in the same way as bills are settled on appeal from intermediate orders.[41]

§ 629. Statement and bill of exceptions compared.

Much space has been already devoted to discussion directly bearing upon the subject of this heading. But little remains to be said. Duplication of what has preceded will be avoided as far as possible.

Under the joint operation of the code provisions as construed by the court, and rule 29, there is little, if any, discernible difference between a statement on motion for new trial made on the minutes and a bill of exceptions on appeal from the judgment, prepared after judgment. Their form is the

36 See post, § 638.

37 Kimple v. Conway, 69 Cal. 71, 10 Pac. 189.

38 See post, § 639.

39 See Esert v. Glock, 137 Cal. 533, 70 Pac. 479.

40 See Esert v. Glock, 137 Cal. 533, 70 Pac. 479.

41 Smith v. Jordan, 122 Cal. 68, 54 Pac. 368; Conklin v. Cullen, 25 Mont. 214, 64 Pac. 502, on construction of Code of Civil Procedure, § 1736.

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same, the proceeding to settle them is the same, they perfo the same office, and may be used interchangeably.[42] Of cou affidavits, used on the motion, cannot be used on appeal fr the judgment, and these must, under the operation of said preme court rule, be embodied in the statement prepared ter a disposal of the motion.

In many of the decisions rendered under the Califor Practice Act of 1851, mention will be found of "Stateme on appeal"; and occasionally the terms are used through advertence, in cases arising under the Code of Civil Procedu The several sections providing therefor were omitted from t code, bills of exception having taken their place. The expr sions, "statement of the case" and "statement used on moti for a new trial, or settled after a decision of such motion," both employed in the section providing what papers may used on appeal from the judgment.[43] Obviously, both expr sions as there used designate the same thing, since no pro sion is anywhere to be found defining or providing for a such paper as a statement of the case. And the courts ha accepted and acted in accordance with this view. But the preme court will not refuse to consider a document settled a filed in due time, which has the essential parts of a bill of ceptions merely because it is called by a wrong name. People v. Crane,[44] the trial judge refused to settle a "sta ment on appeal" served and presented in due time because considered that it was wrongly entitled, and that the co gave him no authority to settle the same. But the supre court, in overruling the objection and awarding the writ mandate commanding him to proceed with the settlement, sai "The objection, however, as we view it, is rather to the for than to the substance of the thing. If it had been entitle 'plaintiff's bill of exceptions,' we think it clearly would hav been the duty of the court to settle it."

42 See Cal. Code Civ. Proc., § 950.

43 Cal. Code Civ. Proc., § 950.

44 60 Cal. 279. See, also, Schultz v. Keeler, 2 Idaho, 333, 1 Pac. 481, to same effect.

§ 630. Extent to which statement on motion for new trial may be used on appeal from judgment.

It is evidently not the intention of the code to confer any advantages upon the appellant by permitting him to use a statement on motion for a new trial superior to those he could enjoy by the use of a bill of exceptions, or any other record.

Therefore, he cannot have a review of any irregularities or orders, for instance, which might be available on motion for new trial, but not on appeal from the judgment, by the mere fact that he used the statement rather than a bill of exceptions, expressly prepared with reference to appeal from the judgment.[45]

§ 631. Identification of affidavits where motion for new trial made and heard on the minutes.

With reference to the statement on motion for new trial, made and heard on the minutes, its preparation and uses, nothing more need be said. It has been necessarily fully considered and often referred to, and must be referred to and incidentally discussed in future connections. It is proposed now to consider it briefly in connection with the identification or authentication of affidavits, which may be used on the motion. Under supreme court rule 29, such statement should perform the office of a bill of exceptions and contain any affidavits, or other documentary evidence, that may have been used on the motion. Under the more recent adjudications, following the adoption of that rule, it is not sufficient to merely have them identified and certified by the judge as having been used as was for a former and considerable period the sanctioned practice.[46]

The Nevada practice is peculiar in this respect. It seems that the statute of that state prescribes identification of affidavits, and other documentary evidence used on the motion, by

[45] See ante, § 424.

[46] See Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Cohen v. Alameda (City of), 124 Cal. 504, 57 Pac. 377; Pereira v. City Sav. Bank, 128 Cal. 45, 60 Pac. 524; Cornish v. Floyd-Jones, 26 Mont. 153, 66 Pac. 838; Shuey v. Holmes, 27 Wash. 489, 67 Pac. 1096.

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the indorsement of the judge or clerk, and the prescr
method is exclusive.[47]

**§ 632. How proceedings subsequent to hearing of mo
shown.**

Rulings on matters which arise collaterally to the hea
of the motion may often be excepted to and required to b
viewed on appeal from the order on the motion; and s
times a separate statement or bill of exceptions will b
quired for this purpose. Thus it was held that the dism
of a motion for a new trial was, in legal effect, a denial o
motion, and the motion being made upon the minutes o
court, a statement must be prepared by the moving part
order that the motion might be considered upon its merits
appeal from the order, upon other grounds than those spe
in the order dismissing the motion.[48] So affidavits made
sequently to the denial of a motion for new trial setting
that the motion was arbitrarily denied without hearing or
sidering the grounds presented and urged in support the
form no part of the record upon appeal from the order,
cannot be considered upon such appeal. The only mod
which such a question can be brought up for review is t
cept at the time to the action of the court and to have the
embodied and settled in a bill of exceptions.[49] Sometime
action of the court may be itself the subject of an indepe
appeal; and the record on such appeal will necessarily
bill of exceptions.[50]

47 Happin v. First Nat. Bank, 25 Nev. 84, 56 Pac. 1121, ho
that affidavits in support of a motion for a new trial will be str
from the record where not shown by the indorsement of the
or clerk to have been read or referred to on the hearing o
motion, as required by General Statutes, section 3217, subdivisi
and that the requirement cannot be avoided by incorporating
affidavits in the body of the statement on motion for a new

48 Davis v. Hurgren, 125 Cal. 48, 57 Pac. 684. See, also, Stra
v. Dakin, 63 Cal. 478; Greiss v. State Inv. & Ins. Co., 93 Cal.
28 Pac. 1041.

49 Williams v. Harter, 121 Cal. 47, 53 Pac. 405. See, also,
well v. Greely, 5 Nev. 258, holding that proceedings occu
after the argument on motion for new trial can be brought t
attention of the appellate court only by means of a statemen
appeal setting them out.

50 See Wilson v. Dougherty, 45 Cal. 34.

CHAPTER 38.

TRANSCRIPT.

§ 633. General office of transcript.
§ 634. Printing transcripts.
§ 635. Arranging and indexing the transcript.
§ 636. Authentication—By stipulation.
§ 637. Authentication—By the clerk.
§ 638. What the transcript must contain.
§ 639. Shortening the transcript by abbreviation, omission, abridgment and order of supreme court.
§ 640. Each appeal to be heard on its own transcript.
§ 641. Transcripts cannot be pieced out by reference to transcripts on file in other appeals.
§ 642. Filing and serving transcripts.
§ 643. Objections to transcript.
§ 644. Procedure to correct and amend transcript.
§ 645. Surplusage in the transcript.

§ 633. General office of transcript.

After the record on appeal has been made up, the next step in the proceeding is to place that record before the appellate tribunal in acceptable form for examination and review. The document used to perform this office is the transcript on appeal.

It will be observed that statutes, codes and practice acts are usually silent as to the method. The provisions of the California Code of Procedure rest the matter upon the requirement that the appellant shall furnish the court "a copy," etc.,[1] which must be authenticated by the certificate of the clerk of the lower court, or the attorneys, as to its correctness.[2]

[1] See Cal. Code Civ. Proc., §§ 950, 952, 661.
[2] Cal. Code Civ. Proc., § 953.

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The arrangement of the transcript, and the form in v
the copies, required by law to be furnished, that is, wh
in writing or in print, the procedure for supplying d
therein, and designating the consequences of a failure to
form to all such requirements and regulations, are us
though not always, governed and regulated by rules of th
pellate court, in the exercise of its power to prescribe the
of exercising its jurisdiction, rather than by statute.
power is exercised by the adoption and promulgation of
rules.

§ 634. Printing transcripts.

Prior to 1864, there was no rule of the supreme cou
California requiring transcripts to be printed, and most o
transcripts were written. Even in the absence of a court
or any statute on the subject, other than one requiring
copies shall be furnished, there is no doubt that a printed
script would be, not only acceptable, but preferable. Th
evidenced, if any evidence were needed, by the remarks of
tice Sawyer in Estate of Boyd,[3] calling the attention of the
fession to the new rule which had just been adopted.
said, in part: "A transcript is a copy of the record, or
tions of the record, in the case, and there is little chanc
disagreement between attorneys as to whether the record i
rectly copied or not, unless it is willful. It was thought
the printing of transcript would greatly facilitate the
ination and hasten the decision of causes, as well as lesse
liability of the judges to overlook or misapprehend impo
facts in the case, and in other respects promote the adm
tration of justice. As each attorney would have a co
would enable the counsel to more thoroughly prepare their
for argument, and facilitate their references to the rec
The rule of the California supreme court then adopted was
5. In the new rules, adopted April 13, 1892, it is rul

[3] 25 Cal. 511, 513.

[4] See printed rules 130 Cal. In Nevada the appellant ha
option to either have the original papers certified to the su
court or a transcript: See Nev. Stats. 1895, p. 58; Peers v.
23 Nev. 404, 48 Pac. 897.

There has never been any change in this rule; only a correction of one or two typographical errors occurring in the first publication. In so far as it relates to civil cases, it reads as follows: "All transcripts of records in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed pages, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition allowed."

§ 635. Arranging and indexing the transcript.

Rule 8 reads as follows: "The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases, by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed." This rule, as at first adopted, consisted of only the first sentence here quoted. The concluding sentence was added in 1878. There have been no other changes. As published in 1892, the words "chronological arrangement," "the other requirements," and "by the court," were italicized. But, neither prior thereto nor since, have the requirements of this rule been uniformly enforced. It has only been in cases of flagrant disregard of the rule, and considerable resulting inconvenience to the court, that its requirements have been mentioned. And, in such instances, the court will take such appropriate action as the infringement of its rules merits, by a dismissal of the appeal, by striking out the transcript, or by compelling the appellant to print and file a

new transcript, conforming to the rules at his own cost, un a penalty of dismissal for noncompliance.[5] Though a fail to comply with such rule may not warrant a dismissal, though it may not lead to any positive adverse action on part of opposing counsel, or of the court, still, it may be obstacle to a full and fair examination of the record.[6]

In California, the observance of the rule has been to some tent secured by rule 10, which provides that "No transcr or other paper or document, which fails to conform to the quirements of these rules, shall be filed by the clerk." T rule was changed in 1892. Previously, it contained the wo "with the clerk." The change shifts the responsibility fr counsel to an officer under the immediate control of the co and better secures its enforcement.

5 In Martin v. Hudson, 79 Cal. 612, 21 Pac. 1135, the transc was ordered stricken out after submission and thirty days gran to appellants to print a new one in conformity to the rule.

6 See Taylor v. McCormick (Idaho), 66 Pac. 805; Authier v. B nett, 16 Mont. 110, 40 Pac. 182. In the second case, the court a adverting to and describing the condition of the transcript, p ceeded as follows: "This record is much like that in Becker Commissioners, 10 Mont. 87, 24 Pac. 700, in which case we s 'The engrosser, instead of constructing a perfect work, has sim piled up the material in a disorderly mass, as it came to his h That this is not an adherence to chronological order does not quire extended discussion': See, also, Newell v. Meyendorff, 9 M 254, 18 Am. St. Rep. 738, 23 Pac. 333, and cases there collect Barger v. Halford, 10 Mont. 57, 24 Pac. 699; Mont. Ry. Co. Warren, 6 Mont. 275, 12 Pac. 641; Fant v. Tandy, 7 Mont. 443, Pac. 560; Sherman v. Higgins, 7 Mont. 479, 17 Pac. 561; Raymond Thexton, 7 Mont. 299, 17 Pac. 258; Rodoni v. Lytle, 13 Mont. 1 32 Pac. 491. . . . . It seems to be a severe course to strike out appellant's record when he appears to have an appeal which sho be sustained. Moreover, in this case the district judge was much at fault in settling the statement as was counsel in prepar it. The record has been in this court for eighteen months, and motion made to strike it out, and no oral argument made by the spondent on the hearing. We concluded to examine the case on merits, but our doing so in this case is not a precedent for a furt exercise of our patience in this respect in the future. The fact that, since the views were expressed in the cases above cited, reco have been much improved, and we have mercifully hesitated to s denly make an example of the appellant herein."

§ 636. Authentication—By stipulation.

The authentication of the transcript is regulated by the code.[7] Court rule 11 supplements the statute and reads, in part, as follows: "If a party shall present to the attorney of the adverse party a transcript on appeal, in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse, to join in such certificate, or, if deemed incorrect, shall neglect or refuse for the same time, to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse for a period of two days to join in such certificate, the costs of procuring the certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses." This rule has existed without change since 1864. The stipulation may go further, if the parties choose to extend it, than to cover the question as to the correctness of the transcript.

The parties are, as much, bound by the terms inserted in the stipulation here provided for as if they appeared in a separate stipulation filed in the appellate court, or entered on its minutes. But an intention to go beyond the purpose of the rule must clearly appear, in order to justify an inference that the attorney intended more than to admit that the transcript contains correct copies of the originals, in so far as it purports to contain them. Unless the attorney desires to go farther than this, the safer course is merely to stipulate that the transcript contains correct copies of the originals on file. A stipulation, however, that "the foregoing transcript is correct" has no different effect, and was held not to waive an omission of the pleadings from the record. In other words, it merely took the place of the clerk's certificate, that the papers, to which it was annexed were true copies.[8] In another case, the stipulation, in addition to admitting the correctness of the copies certified that "the foregoing twenty-one pages constitute the transcript on appeal from the orders appealed from." This was held not to waive a substantial defect in the record, to wit, the

[7] Cal. Code Civ. Proc., § 953.

[8] Todd v. Winants, 36 Cal. 129.

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substitution of a bill of exceptions for a statement on ap required by the Practice Act of 1851. The court said th was manifestly not designed to do more than authenticat transcript as a true copy of the record below, and to dis with the clerk's certificate.[9] In Siebe v. Joshua Hend Works,[10] the same construction was placed upon a stipul to a transcript which was vitally defective. The stipul stated in substance that the copies mentioned were c copies, and that certain documents therein mentioned, we troduced in evidence at the trial. The court said, foll the last-mentioned case, that the stipulation was of no more than the usual certificate of the clerk in authentication transcript. But a certificate of counsel for respective p to the transcript, to the effect that the transcript is corre contains all of the evidence, cannot be contradicted b counsel for respondents, unless it be shown that the cert was obtained by fraud, and that, as a matter of fact, the script is not correct.[11]

Where the parties stipulated that a printed abstract be filed in lieu of the usual transcript on appeal, it wa that one of them could not afterward object that the cou no jurisdiction, by reason of the terms of a statute pro that the jurisdiction of the appellate court should attac on filing the transcript.[12]

9 Wetherbee v. Carroll, 33 Cal. 549.

10 86 Cal. 390, 25 Pac. 14. See, also, Leonard v. Shaw, 1 69, 45 Pac. 1012.

11 Wilson v. Wilson (Idaho), 57 Pac. 708. See, also, B Grayson, 24 Nev. 422, 56 Pac. 231, holding that respondent, pearing and filing his points and authorities upon the merits case, waived all objection to the clerk's certificate to the re

12 Fratt v. Wilson, 30 Or. 542, 47 Pac. 706, 48 Pac. 356. case the court said: "This is a motion to dismiss an appea record shows that the appeal was regularly taken and per but, instead of the usual transcript of the cause, there was this court a printed abstract thereof, by agreement of the thereto, entered into in pursuance of rule 13 (24 Or. 601, 3 viii.) Plantiff's counsel now contend that jursdiction can conferred by consent of the parties, and, under section 541 of Code, is not acquired until the transcript is filed, and that, e the abstract be regarded as supplying the place of the tran

Statutes are found in several states allowing trials upon agreed cases, dispensing with pleadings. Under such a statute, it was held that a statement of facts made by all parties interested, in the superior court, with a stipulation waiving formal pleadings, constituted a record upon which the court, on appeal, would consider the cause.[13]

In North Dakota, the preparation of statements of the case, and abstracts thereof, is regulated by statute and rules of court, and these cannot be superseded by the combined action of counsel and the trial court from which the record is transmitted.[14]

§ 637. Authentication by the clerk.

The code provides that "The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form,

the one filed herein is not sufficient to enable the court to determine the appeal upon its merits, and for these reasons move to dismiss it. Whether the notice of appeal is to be considered in the nature of process, upon the service of which this court obtains jurisdiction, and the transcript as the evidence by which the judgment is to be reviewed on appeal, so that the parties might stipulate the facts involved and ask a construction of the law arising thereon, or whether the filing of the transcript is to be deemed the final act, without which no jurisdiction can be obtained, we do not feel called upon to decide, for the plaintiff, having stipulated with the defendant that the printed abstract should be deemed sufficient for the trial of the cause on appeal, is not in a position to controvert the legal effect of this agreement upon the faith of which the defendant presumptively relied. An examination of the abstract leads us to the conclusion that it fairly presents the question involved, and hence the motion to dismiss the appeal is overruled."

13 Yakima Water etc. Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471.

14 McTavish v. Great Northern Ry. Co., 8 N. Dak. 333, 79 N. W. 443; Security Imp. Co. v. Cass. Co., 9 N. Dak. 553, 84 N. W. 477. To same effect, Shadville v. Barker, 26 Mont. 45, 66 Pac. 496, 761. Where no statement of the case was ever settled but the trial judge transmitted to the supreme court certain papers cerifying that they constituted all the evidence and proceedings had at the trial upon which the findings were made. Held, not a compliance with the statute and stricken out: Brynjolfson v. Thingvalla, 8 N. Dak. 106, 77 N. W. 284.

has been properly filed, or a stipulation of the parties wai an undertaking."[15] The section says nothing as to a certi tion by the clerk where a deposit is made in lieu of an un taking. But it was held, under statutes similar to thos California, that a certificate of the clerk of the superior c that a certain sum was deposited with him by an appellar lieu of his appeal bond was conclusive evidence of that fa The rule of court last noticed prescribes the method by w the right of certification by stipulation, conferred by the ute, may be exercised; but there is not, in any rule, nor in code is there any specification, as to the form of authentic by the clerk.

The transcript must be authenticated in one method or other, prior to submission; else the appeal will be dismiss

The clerk's certificate should be limited to a statement the transcript contains correct copies of the originals, or in his office.[18] Whether they are all that are necessary to stitute the complete record on appeal is not for him to d mine; and a statement to that effect will be ignored, as being within his province. Nor is any purpose accompl by a statement in the clerk's certificate that certain papers stitute, in whole or in part, the judgment-roll.[19] Nor ha

15 Cal. Code Civ. Proc., § 953. Form of certificate used in mons Hardware Co. v. Alturas Commercial Co., 4 Idaho, 38 Pac. 53, held sufficient compliance with Revised Statutes of I section 4821. See Taylor v. McCormick (Idaho), 64 Pac. 239, ing that when the clerk's certificate to the transcript shows he certified a transcript composed of forty-one pages of typewr matter, and the transcript to which such certificate is attach composed of fifty-six pages of printed matter, the certificate is sufficient. As to certifying to evidence in equity cases in Or see Tallmadge v. Hooper, 37 Or. 503, 61 Pac. 349; rehearing de 37 Or. 503, 61 Pac. 1127.

16 In re Sullivan's Estate, 25 Wash. 430, 65 Pac. 793. It w no doubt be prima facie sufficient in California, but within reasoning in Duncan v. Times Mirror Pub. Co., 109 Cal. 60 Pac. 147, it would not be conclusive.

17 As to which, see post, §§ 650, 665.

18 See State v. Millis, 19 Mont. 444, 48 Pac. 773.

19 O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588. In this the court said: "The transcript contains what purports to

lower court any more power to decide or order what papers shall constitute the record on appeal than the clerk.[20]

The power of the supreme court over the clerk of the lower court, for the purposes of appellate jurisdiction, is fully considered under a more appropriate head.[21]

In the certificate is the proper place for the insertion of a recital that "an undertaking on appeal in due form," or a stipulation of the parties waiving it, has been properly filed.[22]

The stipulation waiving the undertaking should, of course, be filed with the clerk of the lower court.

The clerk is not concerned as to the sufficiency of the sureties, except where called upon to officiate in the proceeding to justify them. Where the undertaking is "in due form," and has been "properly filed"—that is, filed in proper time—it is

copies of the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, with a certificate of the clerk attached, which states that they are correct, but does not say that they constitute the judgment-roll. Respondent claims that we cannot consider matters contained in these papers without a certificate of the clerk that they are copies of the records which constitute the judgment-roll. This contention cannot be sustained. The code specifies what documents shall constitute the judgment-roll. Except in cases of default, it is made up by attaching together 'the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to change of parties, and a copy of the judgment'; Code Civ. Proc., § 670. It is no part of the duties of the clerk to certify that the papers contained in the transcript constitute the record on appeal although it is the general practice, and is proper for the clerk in his certificate to state that the transcript contains a copy of the judgment-roll. In the absence of a showing to the contrary, we must presume that the pleadings, order, findings, and judgment mentioned in the certificate are those which constitute the judgment-roll. If they do not, it is an easy matter for the respondent, upon suggestion of diminution of the record, to have the transcript corrected here.''

20 People v. Center, 54 Cal. 236, as to proper function of the clerk herein, and absence of power of lower court to direct herein; Buckman v. Whitney, 28 Cal. 555, to same effect.

21 See chapter 42.

22 Cal. Code Civ. Proc., § 953.

his duty to so certify.[23] In Winder v. Hendrick,[24] the
certified that "an undertaking on appeal was properly
but made no mention of the form. There being no atter
have a copy of the undertaking certified, to show its for
supreme court dismissed the appeal, and indicated the
practice, thus: "The certificate contains no statement or
that an undertaking on appeal 'in due form' has been pr
filed. That the expression 'properly filed' is not the equi
of, and was not intended to include, 'in due form,' is ap
from the wording of the section itself, which requires the
to certify to two distinct and separate facts, to wit, th
undertaking is in due form, and that it has been properly
It needs no argument to establish that a paper-writing i
not regular may be 'properly filed,' or that one in due
may (reference being had to the time of filing, or the
with whom filed, or other circumstances), be improperly
In People v. Center (No. 6979), we held that, with res
all matters connected with our appellate jurisdiction
court must treat the clerks of the superior courts as und
direction and control. If, therefore, the undertaking

23 See Murphy v. Northern Pac. Ry. Co., 22 Mont. 577, 5
278, holding that under Code of Civil Procedure, section 1
quiring the certificate of the clerk to state "that an unde
on appeal in due form has been properly filed," a certificate
a good and sufficient undertaking on appeal approved by
been filed in my office" is fatally defective. In the first cas
the court said: "In the certificate to the transcript the clerk
'that a good and sufficient undertaking on appeal, approved
in the sum of three hundred (300) dollars has been filed
office.' The defendant now moves this court to dismiss the
so taken or attempted to be perfected. The record before
not present for review any order or judgment without a cer
of the clerk or of the attorneys 'that an undertaking on ap
due form, has been properly filed, or the stipulation of the
waiving an undertaking,' the appeal ought to be dismis
motion: Code Civ. Proc., § 1739; San Francisco etc. Pacific
Co. v. Anderson, 77 Cal. 297, 19 Pac. 517; State ex rel. Pie
Millis, 19 Mont. 444, 48 Pac. 773. Here there is neither a
cate of the attorneys nor a stipulation waiving undertakin
the clerk's certificate, not conforming to the statute in the
mentioned, is fatally defective."

24 54 Cal. 275, 277. See, also, Watson v. Cornell, 52 Cal.

peal was, in the opinion of appellant, in due form, he could have moved this court that the clerk below be directed to make the certificate accord with the fact. If, upon such direction, the clerk entertained doubt as to the form of the undertaking, it would have been a sufficient compliance on his part with our order to certify up a transcript of the undertaking—such as it was."

If in doubt as to the sufficiency in the form of the undertaking, the clerk should insert a copy of it in the transcript, and certify to its correctness as a copy. It is here assumed that this would be permissible. The above proposition can hardly he said to conflict with San Francisco etc. R. R. Co. v. Anderson,[25] where there was no reference whatever in the certificate to the undertaking. Such certificate as above suggested would certainly be better than the one used in that case. The sufficiency of adopting the above suggestion was indicated in a dictum in a recent case.[26] And it must equally appear that it was "properly" filed, that is, filed within proper time.[27]

It was held in Duncan v. Times-Mirror Co.,[28] that neither is the certificate of the clerk nor the certificate of counsel which merely takes its place as to the form and filing of the undertaking conclusive, as against an objection that none was filed. In that case, a certificate by the county clerk in the usual form was relied on by the appellant as conclusive, it being insisted that, if it were false, the respondent had his remedy upon the official bond of the clerk. But the court said: "This proposition has been frequently suggested here on the consideration of similar motions, and, although it has not been discussed in any reported decision, the court has constantly and frequently permitted parties to go behind this certificate. It could not have been intended that the judgment of the clerk should be final in this matter. . . . . That we are not bound

[25] 77 Cal. 297, 19 Pac. 517. See Wakeman v. Coleman, 28 Cal. 58; Bennett v. Bennett, 42 Cal. 629; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284, where the remedy for a certificate defective in this respect is pointed out; Menard v. Montana Cent. Ry. Co., 22 Mont 340, 56 Pac. 592.

[26] Pacific Mut. L. Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260.

[27] Pacific Mut. L. Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260.

[28] 109 Cal. 602, 606, 42 Pac. 147.

by his certificates as to the correctness of a record has bee repeatedly decided. On the contrary, when necessary, we mu compel him to correct his certificate, and transmit to this cou a proper record."

In Perkins v. Cooper[29] the question was as to the conclusiv ness of the usual certificate by counsel. The court held th section 953 placed the certificate of the attorneys upon the sam plane as the certificate by the clerk, and permitted the respond ent to prove, against the certificate of his attorneys, that n undertaking on appeal had in fact been filed. The rational

29 87 Cal. 241, 25 Pac. 411. That the filing of the undertakin is jurisdictional and its filing cannot be waived except in strict con formity to the statute and within the time that an undertaking ca be regularly filed is made clear by the opinion in this case as follows "Attached to the transcript which has been filed herein, there i a stipulation, entitled in this court, agreeing to the correctness o the transcript and stating that a good and sufficient undertaking o appeal has been duly executed and filed. It is both proved and con ceded that this statement is untrue, and the attorney for respond ent says that he signed it without actual knowledge of the fact and relying upon the statement of the counsel on the other si that such an undertaking had been filed, coupled with the fact tha he knew the counsel to be perfectly familiar with the requirement of the statute and a careful practitioner, and also that the partie were amply able to file the undertaking. There is possibly som doubt as to just what was said on the subject when that stipulatio was signed; but there is no doubt about the fact that the state ment contained in it on the subject of undertaking was untru From that fact, it follows: 1. That there was then no case in thi court in which counsel could bind a client by such a stipulation; 2 That if the language of the stipulation could possibly be construe as a waiver of an undertaking (which we very much doubt), i could only operate as a waiver as of and from the date of thi stipulation, March 28, 1889, and there was at that date no appea pending in which to waive an undertaking, and no cause pending in this court in which to make the stipulation. In re Skerret 80 Cal. 63, 22 Pac. 85, it was held that, in order to entitle certai parties to appeal without filing an undertaking, under section 94 of the Code of Civil Procedure, the order dispensing with th undertaking must be made within the time prescribed by law fo filing the undertaking. So if the filing of an undertaking is to b waived, it must be done within the time for filing; otherwise, th appeal is lost, and the party has acquired a right of which he can not be deprived by that attempt to appeal."

of these decisions is: 1. That in order to confer appellate jurisdiction there must be in fact, an undertaking filed or a waiver of it; and 2. That a false certificate, either by the clerk, or the attorneys, as to the form and filing of the undertaking, does not confer jurisdiction. Nevertheless, both the clerk's certificate and the stipulation constitute statutory proof, exclusive in its nature. Besides it has been held, in numerous cases, that the contents of the transcript cannot be assailed by extrinsic evidence. The above decision must be accepted, however, as establishing the law on this question for the present.

Where, by law, it is permissible to have certified up the original papers in lieu of a transcript, the clerk's certificate thereto must substantially conform to the statutory requirements.[30]

§ 638. What the transcript must contain.

A transcript performs the office formerly performed by a petition for writ of error; that is to say, it is in effect a pleading. Like the complaint in a trial court, it brings a proceeding

30 Holmes v. Idaho Min. Co., 23 Nev. 23, 41 Pac. 762. See, also, Becker v. Becker, 24 Nev. 476, 56 Pac. 243. In the first case the court said: "The respondent moves to dismiss the appeal upon the ground that the record is not certified or authenticated as required by law. It consists of the original papers as authorized by statutes of 1895, p. 58. That act provides that when the appellant desires to have the original papers sent to the supreme court, they shall be 'certified by the clerk of the district court, or by the respective parties or their attorneys, to be such originals, or to constitute in whole or in part, the record on appeal.' Several of the papers in the case are not certified in any manner either as copies or originals, and none of them are certified to constitute in whole or in part, the record on appeal. The motion must, therefore, be granted. This is a defect that doubtless could have been remedied; but, although the motion was made more than two months ago, and thereby the appellant's attention particularly called to the matter, no attempt has been made to do so." In granting a motion to dismiss the appeal in the second case the court said: "Respondent moves the court for an order dismissing the appeal, on the ground that the original papers are not properly certified. They are certified to be all of the original papers filed in the district court, but are not certified to constitute in whole or part the record on appeal. A record without being certified as the statute requires is not a record on appeal."

in a court having jurisdiction to try and adjudicate upo the issues tendered therein. The right to file it is barre by limitations. If the preliminary steps to file it are no taken within a given time, to wit, the time within whic an appeal may be taken, and it be not actually filed withi a given time thereafter, the right to file it is gone. Th preliminary steps are fixed by statute, and the time for filing b rule of court. It must be prepared according to certain pr scribed forms, and must contain copies of certain designate papers, which correspond with the indispensable allegations i a complaint. In like manner, it may be amended; though the is a well-defined limitation upon the right of amendment. I the matter to be inserted by amendment is actually to be foun in the proper place, it may be supplied to complete the original but the document which is here likened to a complaint is no amendable by anything which may be newly created. Unlik a complaint, its allegations are all of legal conclusions, an any which do not answer this description are mere surplusag True, it contains recitals of fact but only preliminarily, or b way of inducement. In other words, the questions of law aris upon facts as in every case, and in every court, but no issue o fact can arise upon the transcript. The constitution confe appellate jurisdiction upon the supreme court in matters of la alone.

Some defects in the transcript are so serious as to necessitat a dismissal, unless cured; others merely have the effect to limi the scope of inquiry. A motion to dismiss performs the offic of a plea in abatement, for matters appearing upon the fac of the transcript, showing a want of jurisdiction. If no motio to dismiss be made, or being made, does not prevail, an ora demurrer to the transcript is understood, to be interposed a every stage. And the whole question to be decided may be sai to resolve itself into one, and that, whether such demurrer sha be sustained or overruled.

All these matters are enlarged upon under other heads in th work. They are noticed here in order to impart a correc view of the document now under consideration.

The indispensable papers and matters are simply and onl

those designated by statute as constituting the record on appeal.[31]

One jurisdictional matter, already noticed, which would otherwise have to appear in the body of the transcript, is covered by a recital in the certificate to the transcript. But the transcript must contain everything else necessary to show that the statutory steps have been taken to give the court jurisdiction. Some of the matters thus to be shown are of things done; but it must also appear that a subject matter within appellate jurisdiction has been reduced to the form prescribed by the statute, and is thus presented; that is to say, that a litigated action or proceeding has been prosecuted to a determination, in the form of an appealable order or judgment, and a record thereof preserved. The jurisdiction of the appellate court must appear by the transcript, nor can other evidence of its jurisdiction be considered.[32] This proposition has reference, of course, to the completed transcript, after all has been done that may be done to cure defects therein.

The necessity for the filing of a notice of appeal has been already pointed out. This jurisdictional fact must appear in the transcript.[33]

The service of the notice of appeal must also be shown.[34] It is held, however, in later California cases that proof of service not appearing in the transcript may be filed in the supreme court, there being no law making proof of service part of the transcript on appeal.[35] In Modesto Bank v. Owens,[36] although

31 The record on respective appeals designated by statute is considered in chapters 33-37.

32 See Hoyt v. Stearns, 39 Cal. 92; Loomis v. Bass, 48 Kan. 28, 28 Pac. 1012.

33 Bonds v. Hickman, 29 Cal. 461; Mayle v. Landers, 78 Cal. 106, 12 Am. St. Rep. 28, 20 Pac. 241; Matter of Gold St. v. Newton, 2 Dak. Ter. 40, 3 N. W. 311; Oliver v. Harvey, 5 Or. 362; Wolf v. Smith, 6 Or. 74.

34 Franklin v. Reiner, 8 Cal. 340; Hildreth v. Gwindon, 10 Cal. 491; Reed v. Allison, 61 Cal. 468, 44 Am. Rep. 555, holding that service according to law must be shown Tootle v. French, 3 Idaho, 1, 25 Pac. 1091; Pardee v. Murray, 4 Mont. 37, 1 Pac. 737.

35 In re Stratton, 112 Cal. 513, 520, 44 Pac. 1028; Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552.

36 121 Cal. 23, 53 Pac. 552.

the affidavit of service had been filed with the clerk of the low court about two weeks after the appeal had been taken, it evident, from the language of the court in refusing dismiss the appeal, that the fact of its having be filed there was of no consequence. The court said: " has always been supposed that proof of service should appe in the transcript; but, if no rule or law authorizes its bei made a part of the record to be certified to this court, then su is not required, and the fact of its absence constitutes no grou for a dismissal. That such proof is not attached to the noti is of no consequence." In the case of In re Stratton,[34] the cou said: "A motion was made to dismiss the appeal herein f failure of the transcript to show a service of the notice appeal upon the administrator of the decedent's estate. At t hearing of this motion proof of such service was made, and t ground for the dismissal was thus obviated."

Speaking generally, all papers which statutes designate constituting part of the record on appeal must be embodied the transcript.[38]

It must appear that the papers set forth in the transcri were filed in the lower court.[39]

37 112 Cal. 513, 520, 44 Pac. 1028.

38 In the case of judgments, see § 577; in case of orders, §§ 52 532. See, also, Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 1 Findings not in statement on motion for new trial where they l long under the Nevada statute will be stricken from the transcrip Beck v. Thompson, 22 Nev. 109, 36 Pac. 562. So in Montana, whe the notice of intention to move for a new trial is required to be the record the appellate court will review an order overruling t motion in the absence of the notice or of anything to show that was waived: Grinnell v. Davis, 20 Mont. 222, 50 Pac. 556. An a peal, purporting to be from a judgment entered after a nonsu granted in favor of the defendants, will be dismissed, if the jud ment-roll embodied in the transcript, as certified to by the cler fails to show that any judgment has been given and entered in t action: Granger v. Richards, 126 Cal. 635, 59 Pac. 118; Greenly Hopkins, 7 S. Dak. 561, 64 N. W. 1128; Searles v. Christiansen, S. Dak. 650, 60 N. W. 29.

39 Mahlstode v. Blanc, 34 Cal. 577, holding however, that the o jection was waived: Wells v. Kreyenhagen, 117 Cal. 329, 49 Pa

But an omission from the transcript of matters not necessary to the validity of the judgment, and not essential to a consideration of the grounds relied on for a reversal, will usually be disregarded.[40]

§ 639. Shortening the transcript by abbreviation, omission abridgment and order of supreme court.

A certain degree of abbreviation is permissible, in preparing the transcript for authentication, even without a stipulation authorizing it. Headings and the titles of the causes need not be repeated. Numerous repetitions may be avoided by abbrevia-

128; Greenly v. Hopkins, 7 S. Dak. 561, 64 N. W. 1128; Mix v. San Diego etc. R. R. Co., 86 Cal. 235, 24 Pac. 1027. Held that under Ballinger's Annotated Codes and Statutes, section 6513, providing that on appeal, a statement of facts must be filed with the clerk of the appellate court, and a copy thereof served upon the adverse party, such copy need not contain the file-marks of the clerk on the original statement: Spokane & I. Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

40 See Butte Butchering Co. v. Clark, 19 Mont. 306, 48 Pac. 303, holding that where an amended complaint was served after demurrer sustained, the transcript on an appeal not involving the demurrer need not contain the original complaint or the order sustaining the demurrer. Often, however, the presence of the original complaint is essential; and in order that the appellant may assail a finding that the appellant must show error, and to assail a finding that the action was not barred by the statute of limitations should bring up the original complaint as part of the judgment-roll, although superseded by an amended pleading, in order to show the date of the commencement of the action; and where he does not do so, the judgment should be affirmed for failure to furnish a proper record, and on the ground that no error appears: Dougall v. Schulemberg, 101 Cal. 154, 35 Pac. 635. A minute entry made by the clerk, reciting that certain documents were offered in evidence, is not a minute order, within the meaning of Laws of Arizona of 1897, Act. 71, section 2, which provides that, when an appeal or writ of error is taken, the clerk shall certify all minute orders in the case; nor does it take the place of the statement of facts or transcript of the evidence provided for by section 1 of such act: Myers v. Farmers' & Merchants' Bank (Ariz.), 60 Pac. 880. As to contents of abstract and presumptions in favor of, see Noyes v. Lane, 2 S. Dak. 55, 48 N. W. 322; Minnesota Thresher Co. v. Schaack, 9 S. Dak. 184, 68 N. W. 287; Plymouth Co. Bank v. Gilman, 9 S. Dak. 278, 62 Am. St. Rep. 868, 68 N. W. 735; Cleveland v. Evans, 5 S. Dak. 53, 58 N. W. 8.

tions and equivalent phrases. Valuable suggestions on this sub ject are contained in the opinion of the court in Estate of Boyd,[41] where the court, per Sawyer, J., said: "We are gratified to fin that transcripts are much less voluminous than formerly, bu many records still contain much that might be advantageous omitted; for all matter that does not tend in some degree illustrate the points litigated is an encumbrance and positive injurious. Many pages are often taken up with verifications papers, acknowledgments of deed, titles of the cause repeat in every paper of the record, etc., when no point is made them; in which case, where the record is certified by the atto neys, it would answer all purposes if in the place of the veri cation, acknowledgment, title, etc., the words 'duly verified 'duly acknowledged,' 'title of cause,' etc., and the date document or filing were substituted."

In view of the labor and expense involved in preparation f appeal, usually proportioned to the magnitude of the transcrip it is important to understand the extent to which, and by wh method, it may be shortened. A reference to the decisions on th subject will disclose that while nothing can be safely omitt which is really necessary to a full investigation of the poin made and relied upon, yet omissions and the substitution equivalent phrases in lieu of substantial repetitions of document especially as to the judgment-roll, when an inspection of th same is not necessary, are much favored. The favor with whic the supreme court views legitimate abbreviations of the tran script is further seen in the opinion in Mariner v. Smith.[42]

An appellant is not necessarily bound to print the entire jud ment-roll, where no injury can result to himself or to the r spondent, merely because of his inability to obtain a stipulatio allowing unnecessary portions of it to be omitted. He ma otherwise, lay a proper foundation for their omission. He ma obtain authority for this purpose from the supreme court, i the manner presently to be explained. Then if a diminutio be suggested by the respondent he may meet it by showing th the omitted parts, if present, would be of no benefit to eith

41 35 Cal. 511, 513. See, also, State v. Hanlon, 32 Or. 95, 4 Pac. 353.

42 27 Cal. 650, 653.

party. If, however, the respondent should succeed in convincing the court that they were necessary, the worst result would be a little delay and the labor and expense of supplying them. But in all such cases the transcript must contain, in lieu of the omitted parts, something to show that they are in the judgment-roll on file below; otherwise a presumption fatal to the appellant's case might arise, upon the transcript, or it might appear that the appeal was premature. For instance, if no point is made by the appellant upon the pleadings, or which in any way involves their sufficiency, or the correctness of any order of the lower court, in connection with them, and no point is made that any finding is outside the issues, or is contrary to an admission made in the pleadings, the only point being the sufficiency of the findings to support the judgment, all the pleadings may be omitted. But in order to show that the appellant and respondent respectively sustain the relation in the action which the appeal implies, if for no other reason, it is necessary that the transcript show, in some form, that pleadings were filed; and some such recital as that on such and such a day plaintiff filed herein a complaint, and on such and such a day the defendant filed herein his answer or demurrer, should appear. So when a complaint in an action for a money judgment contains many counts, and the answer many corresponding paragraphs, but one count and paragraph respectively of each need be inserted; and, in lieu of all the omitted counts, it may be explained that "said complaint contained numerous other counts, substantially identical with the first, the only differences being in names, dates, and amounts, the whole aggregating the sum of $————." This should be followed by a recital that the prayer was for such and such relief, or if thought necessary the prayer should be literally inserted. And it should be stated that the complaint was signed, and by whom. The same course may be pursued with the findings based upon such pleadings.

There is some question as to the authority of the clerk, under the code,[43] to make a certificate to a transcript so shortened, though it is believed that he might legally certify that the transcript contains true copies, "in so far as it purports to contain them," and that the supreme court would hold such certificate

[43] Cal. Code Civ. Proc., § 953.

sufficient. The safer course, however, is to prepare the abbre ated record, present it to the justices of the supreme court, a obtain an order allowing it to be served, filed and printed the transcript on appeal, and directing the clerk of the low court to certify to the same, unless counsel for the respond will join in such certificate. Such orders have been often ma as the minutes and files of the California supreme court sho They do not appear in the reports of decisions.[44]

The order should save to the respondent the right to sugg a diminution of the record, in case he can show that witho the omitted parts the appeal cannot be fairly and fully hea Such condition will be found in most, if not all, the ord so made.

Whether, in case an amended complaint appears in the tra script, it is necessary that the original complaint should al appear, depends upon the question of whether any issue involv calls for an examination of the original. If not, then t original, and all pleadings prior to that upon which the ca was tried, may be omitted. Where the statute of limitations pleaded to a cause of action set up in an amended complaint, no such plea would have been tenable if the same had be alleged in the original, it cannot, of course, be made to app that it was not in fact alleged in the original without an i spection. It is difficult to see how an omission of the origi could be made ground for dismissal in such case. A suggesti of diminution of the record would be the proper proceeding

If the question resolved itself into one of the date of the co mencement of the action, the party claiming that the action w barred, would be entitled to have the date of filing the origi complaint appear in the transcript, which could only be sho by the original itself, without which it must be presumed t the action was commenced in due time.[46]

But nothing above should be construed to warrant the leavi out of any portion of a document, where it is not a substant

44 Such an order was made in Meyer v. Bishop, 129 Cal. 204, Pac. 919, and in other cases which could be mentioned.

45 See post, §§ 644, 665.

46 Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384, and note; Ca cron v. San Francisco, 68 Cal. 391, 9 Pac. 430.

repetition of matter previously inserted in the transcript or is merely formal and introductory, without a stipulation or an order of the appellate court permitting it. Thus, in Kimball v. Semple,[47] where portions of the statement on appeal were omitted without consent or authority, and no steps were taken to cure the defect, prior to submission, the court said: "This was an appeal from an order denying a motion for a new trial, based on a statement. The statement was, therefore, 'one of the papers used on the hearing in the court below.' It was appellant's duty to furnish a copy of the whole statement. He was not authorized to leave out any portion unless upon stipulation of the other party. He is not authorized to assume that any part is immaterial and omit it. It is seldom necessary to insert an entire deed in a statement. When a conveyance is regular and no question is made on it, it is sufficient to say in the statement that a deed of such a date conveying the land from A to B was introduced, or that conveyances were introduced showing that the title of A had become vested in B. But if, instead of a brief statement of the contents, conveyances in whole or in part are made a part of the statement, they become to that extent a part of the record, and cannot be omitted in the transcript on appeal unless by consent of parties. The place to object to the introduction of immaterial matter is when the statement is made up and settled. If matter clearly immaterial is introduced into the statement against the objection and exception of one of the parties, and the fact is made to appear in the record, the party insisting upon its introduction will be taxed with the costs of the immaterial matter, irrespective of his success on the appeal. But if introduced and allowed in the settled statement, the whole statement must be brought up, unless omitted by stipulation of the parties. We cannot presume that a part of a statement contains all that is relevant to the points that may be made. At all events, the respondent cannot be compelled to have his case heard on a partial transcript. We review the action of the court below and in denying the new trial the district court acted upon the entire statement as settled, and not merely upon that portion contained in the transcript."

[47] 31 Cal. 658, 664.

Much will depend upon the points made against the ju ment or order appealed from, whether a given portion ma omitted. Of course it will often happen that the responder best served by making no objection to the transcript on score of omissions; and it behooves the appellant to see th contains sufficient to affirmatively show the error of which complains. McQuade v. Whaley,[48] was a case in which an pellant had omitted the pleadings, and substituted a b synopsis, without a stipulation. The opinion also supports proposition that omissions of parts of the judgment-roll sometimes without prejudice, and even advantageous. court said, in part: "On appeal from an order denying a trial, on the ground that the evidence is insufficient to sus the cause of action alleged, the court, in considering the q tion, must necessarily refer to the issues formed by the pl ings, and the court below must, also have referred to the pl ings in determining the question. Without some knowledg the issues, it would manifestly be impossible for this cour intelligently review the action of the court below. A new t might be denied or granted upon grounds that would req no reference to the pleadings to enable the court to deter the propriety of the ruling, as, for instance, in the case of conduct of the jury in the determination of a case by a re to chance. But the transcript should always contain eno of the record of the court below to fully present the quest and show the materiality of the point relied on to reverse judgment or order; and generally, whenever a pleading or o paper has been necessarily used on the hearing in the c below a copy of the pleading or an agreed statement of contents of so much, at least, as is relevant to the point issue, should be furnished in the transcript. The brief of the issues in the case preceding the statement in the tr script is undoubtedly sufficient to enable this court to int gently apply the evidence, and would answer all the purp

48 29 Cal. 613. See, also, Todd v. Winants, 36 Cal. 130, where court said: "Without the issues we cannot ascertain what the c below, in fact, decided, in ordering a nonsuit. It is not necess in all cases to bring up the pleadings in full. A summary will most cases, answer every purpose on the appeal, but it must agreed to by the counsel for the respective parties."

of the pleadings, had it been stipulated by the counsel that it might take the place of the pleadings, or perhaps, if it had been made a part of the agreed statement, and had thereby received the sanction of the adverse counsel. We can perceive no objection to abbreviating transcripts in this mode by consent, care being always taken to include sufficient to fully present the points in controversy. But as it stands, it is the wholly unauthenticated statement of the issues made by the counsel on one side only, really constituting no part of the transcript, and might as well have been in the brief." In view of the circumstances, the court permitted the appellant to file certified copies of the pleadings within ten days.

§ 640. Each appeal to be heard on its own transcript.

This rule does not require that each transcript on appeal in the same case shall be printed under a separate cover, or that there shall be a separate certificate by the clerk for each appeal, where more than one appeal is transcripted under the same cover. But an appellant has no more right to combine and commingle matters relating to different appeals in the same transcript than to commingle various causes of action in one count of a complaint. The inconveniences of making, answering, arguing and deciding the points made upon the respective appeals, in the case of a violation of this rule are so obvious as not to require specification.

It is scarcely necessary to say that the placing of several printed transcripts in the same case under one cover does not render them any the less several transcripts; but where that is done the titles should severally appear on the front cover, with a designation of that particular judgment or order from which the appeal is taken. The page where the transcript on each appeal begins should also be given. And it would be well if the transcripts appeared in their chronological order; transcripts on appeal from an intermediate order preceding that from the judgment, and that from an order on motion for new trial, or other order after judgment, succeeding that from the judgment.[49] There appears, however, to be an exception to the rule at the head of this section in cases of appeals both from

[49] People v. Center, 61 Cal. 191, 195.

the judgment and from an order on motion for new trial
the same case. The reason for the exception is that such t
scripts are essentially distinct, the bill of exceptions, or s
ment, following, in natural sequence, the other papers co
tuting the judgment-roll.[50]

**§ 641. Transcript cannot be pieced out by reference to t
scripts on file in other appeals.**

This rule is but an extension, or rather an illustratio
the preceding. In addition to its being a violation of the
ute requiring the appellant to furnish "a copy," etc., its d
gard, would lead to the greatest of inconvenience and abuse
prohibits a party incorporating by reference all or portio
the transcript on another appeal taken by him in the same
In Kimball v. Semple,[51] the respondent had procured t
stricken out the proceedings on motion for new trial.
appellant, upon a proper showing, was permitted to have
tain papers certified to the supreme court to cure the defe
the record. Other facts appear in the extract below. The c
in affirming the order denying a new trial, said: "On the
entation of the last transcript and said certificate, appe
asks leave to file the same, and moves the court to vacat
order striking out portions of the first transcript filed, w
view of using portions of the same, in connection with the
transcript, and the certificate thereto appended as the
script, in the case. If sufficient could be gathered by comb
portions taken here and there from the first transcript
the last, such a practice would be inadmissible. It would
pose upon the court the labor of carefully comparing the
documents, and selecting out fragments here and there in
and inserting them in their proper places in another,
it is the duty of the appellant himself to furnish the court
a complete, clean, properly arranged and properly authenti
transcript." But sometimes, and especially where it i
parent that no prejudice can result to the opposite party

50 See McDonald v. McConkey, 57 Cal. 325.

51 31 Cal. 658, 662. To same effect, Gates v. Walker, 35 Cal.
Fair v. Stevenot, 29 Cal. 487; Spangler v. San Francisco, 84 Ca
18 Am. St. Rep. 158, 23 Pac. 1091; Bertz v. Turner, 102 Cal. 67
Pac. 1014; Plaisted v. Nowlan, 2 Mont. 363.

any inconvenience to the court, this rule will be relaxed. Thus, where an appeal had been dismissed without prejudice, it was held that the court might permit the appellant to use the transcript on file on another appeal, taken in proper time, and from the same judgment or order.[52] So where the appellant, supposing a first appeal was of no avail, took a second appeal, and it turned out that the first appeal had been properly taken, he was permitted to use the transcript prepared and filed on the first appeal.[53]

§ 642. Filing and serving transcript.

In California, there are no code provisions on the subject of filing and serving transcripts.[54] In the absence of court rules on the subject the appellant might print his transcript and retain it, without the knowledge of the respondent, and need not present it, until the hearing of his appeal, except perhaps to have the case placed on the calendar. Elaborate rules have been adopted, however. Those at present in force are as follows: "Rule 11. Before the printed transcript (in cases in which a printed transcript is required) is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party appearing by different attorneys, upon the attorney of each party so appearing. . . . . Rule 2. 1. The appellant in a civil action shall, within forty days after the appeal is perfected and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys

52 Dooling v. Moore, 19 Cal. 81.

53 Hill v. Finnigan, 54 Cal. 311. When record on former appeal may be used: See Plymouth Co. Bank v. Gilman, 3 S. Dak. 170, 44 Am. St. Rep. 782, 52 N. W. 869.

54 In Washington ninety days are allowed by statute for filing transcript after taking the appeal: Sess. Laws, Washington, 1901, p. 29, sec. 2. As to statute in Oregon on the subject, see Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951. An appeal is "perfected" when notice has been served and filed, and an undertaking is filed, as required by statute (Rev. Stats., § 4808), within supreme court rule 27, paragraph 8, requiring the transcript of the record to be served and filed within 60 days after the appeal is perfected: Hattabaugh v. Vollmer, 5 Idaho, 23, 46 Pac. 831.

of the respective parties, or by the clerk of the court from wh
the appeal is taken; 2. Written evidence of the service, u
the adverse party, of the transcript shall be filed therewi
3. The time above limited may be extended by stipulation,
shall not be extended by the court more than twenty days;
such extension of time shall be granted only upon good ca
shown by affidavit. . . . . 6. Besides the original there shall
filed seventeen copies of the transcript, and points and authorit
which copies shall be distributed by the clerk in the man
prescribed by law, and one copy to the law library at Los
geles. . . . . Rule 9. Whenevr a map or survey forms p
of the transcript, it shall not be necessary to furnish more t
one copy thereof, which shall be annexed to the transcript f
with and certified by the clerk, and reference thereto shall
made in the other copies. . . . . Rule 31. In all criminal ca
and in all other cases where the state or any officer thereof
his official capacity is a party, and in all cases to which
county may be a party, unless the interest of the county is
verse to the state or to some officer thereof acting in his offi
capacity, no transcript on appeal or brief on behalf of the st
or of such county or officer whom the attorney general is
powered to represent, shall be received or filed by the clerk
this court without proof of the service of such transcript
brief upon the attorney general. On such transcript or br
there shall not be printed the name of any person as the attor
for the state or for such county or officer of the state, other th
the name of the attorney general, without the order of his co
or the written consent of the attorney general first obtained.'

The duty of complying with the above rules is cast upon
appellant exclusively, and a failure may result more or less
his detriment.

The court will, in case of a strong showing of accident, m
take, inadvertence, etc., excuse a failure to file the transcr
in proper time. But a showing that the appellant was out
the state, his postoffice address being unknown to his fam
or counsel; that he had failed to furnish his counsel with n
essary funds to procure a transcript; that he was not advis
prior to his departure as to when the appeal was required
be taken; that his counsel was not advised of his intended

parture, was insufficient.[55] But where a cause was regularly on the docket, and appellant was but two days in default in filing a printed abstract of the record, under a rule of court requiring an abstract to be filed within twenty days after filing the transcript, when the motion to dismiss was served, and the delay had not resulted in material injury to the respondent, and was caused by a misunderstanding of the rule, the appellant was permitted to file the abstract within a time fixed by the court.[56]

It will be noted that the rules make provision for the printing of the transcript by the clerk of the supreme court, upon the deposit of sufficient funds for that purpose. The delivery of the transcript to the clerk without deposit of funds for printing the transcript does not constitute a filing of the same.[57]

Rule 11, above quoted, provides for leaving the transcript with the respondent for a period of five days, in civil cases, for the purpose of procuring a certificate of its correctness. This does not, however, supersede the provision of rule 2, which requires the transcript to be filed within forty days after taking the appeal, nor does it extend the time for filing the transcript until the expiration of the period given to the adverse party to examine the same.[58]

No decision directly upon the point, whether an order of the supreme court extending time is effective absolutely, without being served or filed. But it was held in one case that an appeal would not be dismissed where such an order had been obtained from a majority of the justices, of which order notice

55 Trotter v. Kleinschmidt, 21 Mont. 532, 55 Pac. 29. Where the transcript on appeal was not sent up for several months after the time allowed therefor had expired, and the clerk in certifying it stated that he was unable to make it up sooner because of the press of "other business" in his office, and there was no showing that appellants had requested it to be made out sooner, and nothing to show the nature of such "other business," it was held that the appeal should be dismissed: Chehalis v. Pearson, 10 Wash. 216, 38 Pac. 996.

56 Nottingham v. McKendrick, 38 Or. 495, 57 Pac. 195, 63 Pac. 822.

57 Ward v. Healy, 110 Cal. 587, 42 Pac. 1071; Buckingham v. Reid (Idaho), 48 Pac. 1069.

58 Bethell v. Rogers, 100 Cal. 175, 34 Pac. 645.

was given to the counsel for respondent, though it had not filed, owing to inadvertence of appellant's counsel. In pas upon the motion to dismiss, the court said: "We are incl to think that the paper signed by the four justices was ar der of court before filing." [59]

The rule expressly extends the beginning of the period of f days for filing the transcript until the settlement of any of exceptions, or statement, pending in the lower cou This applies to bills and statements on motion for new which may be used on appeal from the judgment. In So v. Somers,[61] there was a motion to dismiss an appeal from judgment, the forty days after perfecting the appeal ha expired. Upon it being shown that there was an unse statement on motion for new trial pending below, the denied the motion to dismiss the appeal. Nor does the that the judge of the lower court has refused to settle a p ing bill of exceptions, the cause for such refusal being in cient, deprive the party of the benefit of the extension; instance, where he refused upon the sole ground that the grossed bill had been filed in the clerk's office, and tha had no authority to certify it.[62] But the case here pres is clearly distinguishable from a case in which, prior to tlement, the proceedings for settlement have entirely te nated, and the appellant has allowed more than forty da elapse without taking any step, either to procure a settle or to file the transcript. In a case presenting that cond the court took occasion to explain the principles applicab the whole subject, as follows: "If the time within which

59 Desmond v. Faus, 83 Cal. 134, 23 Pac. 303, referring to Co Civil Procedure, section 1003, for definition of an order. To effect: Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228.

60 A similar exception to the rule is in force in Nevada Hayes v. Davis, 23 Nev. 233, 45 Pac. 466.

61 83 Cal. 621, 24 Pac. 162. See, also, Wall v. Mines, 128 Cal 60 Pac. 682. Although Smith v. Trefy was not referred to in cases, it must be considered as overruled.

62 Jackson v. Puget Sound Lumber Co., 115 Cal. 632, 47 Pac Time during which clerk fails without fault of appellant to pro certify transcript is not counted against the latter: State v. 34 Or. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25. See, also, Richa v. Spangle, 22 Wash. 14, 60 Pac. 64.

bill of exceptions or statement may be proposed or settled has not expired, or if proceedings for its settlement are still pending before the judge and undetermined by him, the appellant cannot be said to be in default for failure to comply with the rule for filing the transcript. A refusal of the judge to settle the proposed bill, or a disallowance of the same, after proceedings for its settlement have been taken before him, should be regarded for the purposes of the rule with the same effect as its settlement. The appellant would not know, until such action by the judge, that the bill would not be settled, and a reasonable construction of the rule would allow him the same time after such disallowance, within which to file the transcript as if the bill of exceptions had been settled at that date instead of being disallowed." [63]

But it must appear that the unsettled bill of exceptions, on account of which it is claimed that the time is extended, is one which could be used on appeal from the judgment. In Pignaz v. Burnett,[64] the appellant urged, in response to a mo-

63 White v. White, 112 Cal. 577, 44 Pac. 1026.

64 121 Cal. 292, 53 Pac. 633. To same effect, Butler v. Soule, 117 Cal. 226, 49 Pac. 5. If the lower court has no authority, or jurisdiction to grant or refuse a new trial it has none to settle a bill or statement therein, and it must be presumed that the judge of that court will refuse to settle it. If he should assume to settle it, and to allow its use on such motion, such use would be a nullity. In Cosgrave v. Howland, 24 Cal. 458, there was in the transcript a statement on the appeal from the order on motion for a new trial but none on appeal from the judgment. The court said: "This is a proceeding under the provisions of article 6 of the act to regulate elections, to contest the right of the defendant, Howland, to the office of recorder of Napa county. The appeal is taken from the judgment and an order overruling a motion for a new trial. The transcript contains a statement on the motion for a new trial, and it may be used as such in determining the appeal from the order, but cannot be so used in determining the appeal from the judgment; in the absence of any stipulation to that effect. No such stipulation is to be found in the transcript. In Dorsey v. Barry, 24 Cal. 449, we held that the proceedings authorized by article 6 of the act to regulate elections are special and summary, and that no remedy can be had under the provisions of that article, except such as is therein expressly or by necessary implication provided. We also held that a new trial was

tion to dismiss the appeal, that there was an unsettled bill exceptions in the lower court, which had the effect to exte the time for filing the transcript. But the court, in granti the motion, said: "An inspection of this document shows, h

not authorized by the provisions of the article in question, and t the remedy of a party who is dissatisfied with the judgment of county court is by appeal only. Under the decision in that case. cannot consider the appeal from the order denying the motion fo new trial. As already stated, there is no statement on the app from the judgment, and it therefore stands upon the judgment alone." "Bills of Exceptions," and "Statements" projected to used on motion for new trial are but different "labels" for the s thing under the rule of the supreme court: See Kelly v. Ning Y Assn., 138 Cal. 602, 72 Pac. 148. An appeal will not be dismissed pe ing the settlement if there has been no lapse, although a period more than forty days has elapsed since the appeal was taken. will be presumed, nothing appearing to the contrary that the bill statement will be used on the motion when it comes up for heari But there must be at least a potential prospective use; and if it firmatively appears, at the hearing of the motion to dismiss, that th is no proceeding for a new trial pending or possible, or that it i case in which the lower court has no authority to grant a new t the pendency of settlement will be no answer to the motion to miss. The first of these propositions rests upon many decisions and pecially upon Somers v. Somers, 83 Cal. 621, 24 Pac. 162; Wall v. Mi 128 Cal. 136, 60 Pac. 682; and Kelly v. Ning Yung Assn., 138 602, 72 Pac. 148. The second proposition, namely, that if it app that the bill or statement when settled cannot be used on the app sought to be dismissed, it is no answer to the motion, rests u Cosgrave v. Howland, 24 Cal. 458 the Estate of Franklin, 133 584, 65 Pac. 1081, and other cases. That the legal impossibility using the bill or statement may be shown and will be conside on the motion to dismiss, is well settled by the decisions. No clea case to this effect could be wished for than Estate of Franklin, su But there are other cases. The rule is pithily stated in Butler Soule, 117 Cal. 226, 49 Pac. 5, in these words: "The bill of excepti therein referred to (having reference to rule 2, of this court), is t which is applicable to the matter appealed from, and when an app from the judgment is taken at the same time with an appeal fr an order made after judgment, although both appeals may be c sidered upon the same transcript, the time for filing the transcr upon the appeal from the judgment is not extended until the set ment of a bill of exceptions taken upon the order appealed from The court here cites Buckley v. Althorp, 86 Cal. 643, 25 Pac. 1 Turning to that case it is found that the appeal was dismissed cause, although by stipulations and orders of court the settlem

ever, that it is a bill of exceptions taken upon the order of the court refusing to vacate its order for the issuance of a writ of assistance, and refers entirely to proceedings taken subsequent to the entry of the judgment. It could not, therefore, be used or referred to upon the appeal from the judgment, and does not extend the time within which the transcript should be filed."

of the statement had been regularly extended, it appeared from the documentary evidence brought to the attention of the court that the notice of intention to move for a new trial on the minutes did not contain any specifications whatever. The court said: "The extensions of time are therefore secured to do something which the law did not authorize to be done, whether that something was to prepare and serve proposed, 'statement on appeal,' or 'statement of the case subsequently made." The following from Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633, seems to settle the rule and practice herein. At page 293 in the opinion, the court in dismissing the appeal, said: "Upon the motion to dismiss the appeal from the judgment, the respondent has presented a copy of the bill of exceptions which was proposed in behalf of the appellants, and upon which they rely to be relieved from their failure to file the transcript herein until it shall have been settled by the judge. An inspection of this document shows, however, that it is a bill of exceptions taken upon the order of the court refusing to vacate its order for the issuance of a writ of assistance, and refers entirely to proceedings taken subsequent to the entry of the judgment. It could not, therefore, be used or referred to upon the appeal from the judgment, and does not extend the time within which the transcript should be filed." There is no conflict whatever between anything said in the cases on this subject. In the course of the opinion in Wall v. Mines, 128 Cal. 136, 60 Pac. 682, the court said: 'Whether the statement in the present case can be used upon the hearing of the appeal is not involved in this motion, and will be determined when the appeal itself is heard. It does not affirmatively appear that it cannot be so used" (page 140). Now, take the broadest proposition to be found in the opinion in Kelly v. Ning Yung, supra, in favor of the right of the appellant to answer by setting up an unsettled statement or bill as an answer to the motion to dismiss: "Here," says the court, "the settlement of a statement is still pending, and if the settlement is such that it may be used in support of this appeal the fact that it is still unsettled is a complete answer to the motion to dismiss." The qualifying words were, no doubt, due to the rule of the case of Estate of Franklin and the other cases before cited where appeals were dismissed pending the settlement of statements which were projected upon theories that they could be used upon motions for new trial, whereas, in fact, and as a matter of law there was no legal possibility for such use.

And under the code provision authorizing the judge o lower court to extend the time for filing the undertakin period of forty days does not begin to run until the expir of the extension.[65]

Clearly, the pendency of a motion to dismiss the appeal not extend the time for filing the transcript.[66]

It is the duty of the appellant to pay all fees allowed b in connection with the preparation, certifying and filin transcript; and the fact that it is withheld on account o payment of such fees is no excuse for delay.[67] Nor h appellate court power to relieve a party from the oblig to pay the legal fees.[68] If the last day for filing falls holiday, the transcript may usually be filed on the next bu day.[69]

The transcript is served according to statutes governi service of papers generally.[70] Under the rule of the su court of California, it has been the uniform practice to the printed transcript; the appellant not being bound to it in writing.[71]

The appellant should see that the copies served and de correspond in every respect with the original, which the files. In Franklin v. Goodman,[72] the court said: "It duty of the appellant to attend to clerical and typogra errors, and see to it that each transcript is a true copy original, in all respects, other than the maps and su This labor does not devolve upon the members of the for they never take from the clerk's office, or examine the inals, unless it contains the only copy of a map or surve

65 Wadsworth v. Wadsworth, 74 Cal. 104, 15 Pac. 447.

66 White v. White, 112 Cal. 577, 44 Pac. 1026.

67 See State v. Brewing Co., 2 S. Dak. 363, 50 N. W. 629; v. Talkington, 5 Idaho, 316, 49 Pac. 14.

68 Therkelsen v. Therkelsen, 35 Or. 75, 54 Pac. 885, 57 Pa

69 Wachsmuth v. Routledge, 36 Or. 307, 51 Pac. 443, 59 Pa

70 See Times Printing Co. v. City of Seattle, 25 Wash. 149, 6 940.

71 Lang v. Specht, 62 Cal. 145, sanctioning the practice.

72 31 Cal. 459. To same effect, Rousset v. Boyle, 45 Cal. 64 sault v. Edwards, 43 Cal. 458.

on the trial; but when a copy is taken up for investigation, it is presumed that the appellant has performed his duty, and that the transcript is what it purports to be, a true copy of the original."

§ 643. Objections to transcript.

Defects of matter, other than omissions of the notice of appeal, or recital of the filing of an undertaking, which go to the jurisdiction, in the transcript, are not a ground for dismissal, unless the defects pointed out are so serious as to amount to an entire failure to file a transcript. But they may be prejudicial to the respondent, entitling him to have them cured, and, upon a failure therein, to have parts of the transcript as presented, and upon which the appellant relies for a reversal, refused consideration by the court. The rule as to the time and manner of objecting reads as follows: "Rule 15. Exceptions or objections to the transcript, statement, the bond or undertaking, on appeal, the notice of appeal, or its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant, in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file, at the hearing of the cause, such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise, such objection or exception, if well taken, shall prevail."

Some of the defects will be considered waived unless excepted to according to the rule, while others may be of a character precluding any consideration by the court of the points urged by the appellant. The court cannot review a case upon a record, which presents no case; nor can it review part of a case upon which no record, or an invalid record is presented. The distinction between a defect which may be waived and one which will deprive the appellant of a review, unless he take timely steps to have it cured, when that can be done, was clearly shown in Todd v. Winants,[73] the court saying: "The respond-

[73] 36 Cal. 131. Said rule 13 is now rule 14: See Taylor v. McCormick (Idaho), 64 Pac. 239; Whipple v. Southern Pac. Co., 34 Or. 370, 55 Pac. 975.

ents' objections are not waived by their failing to take an e
ception to the transcript, according to rule 13 of this cour
The question is not whether the appellants may be heard
the points of error assigned, but it is whether the record, as n
presented, discloses any error. The respondents, moving u
der that rule, say, in effect, that the transcript is not in su
condition as to entitle the appellants to be heard on the erro
assigned, because it does not appear that the notice of appe
was served or that the documents are properly authenticat
as true copies, or that the statement was settled by the jud
or agreed to by the parties, or because of some other techni
objection to the transcript, but when the transcript contai
only a part of the record or proceedings necessary to pres
or explain the points relied on, the respondents' position
that the appellants do not show any error. If, for instan
the point is that the evidence is insufficient to justify the v
dict, and it does not appear by the transcript that the sta
ment was settled or agreed to, the respondents may take
vantage of the omission under the thirteenth rule, and the
pellants cannot be heard upon that point, unless the omiss
is supplied; but if the statement is omitted from the transcri
no error in the respect complained of is shown, for it does
appear upon what evidence the court below acted."

§ 644. Procedure to correct and amend transcript.

The proceeding by which a defective record on appeal
be amended is termed "suggestion of diminution of the reco
notwithstanding that, if successful, it generally results in
enlargement, rather than a diminution. If the appellant
quires an amendment, this is his only method of proced
while the respondent can avail himself either of this, or by
ceptions, according to rule 15. The rule for this proced
reads as follows: "Rule 14. For the purpose of correcting
error or defect in the transcript, either party may suggest
same in writing, and upon good cause shown, obtain an o
that the proper clerk certify to this court the whole or
of the record, as may be required, or may produce the s
duly certified without such order. If the attorney or cou
of the adverse party be absent, or the fact of the alleged e
or defect be disputed, the suggestion, except when a certi

copy of the omitted record is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged." The transcript cannot, properly speaking, be amended under the proceeding; that is to say, nothing in the record can be so changed as to speak otherwise than as it appears in the transcript on file. Omitted papers must be properly certified and presented in their entirety. But this rule against changing the sense and meaning of the original does not prevent a party from furnishing a complete document to take the place of one in the original, which is defective. And no aid can be afforded by the supreme court in the case of a record which has been lost from the office of its proper custodian. In such case, the party should first proceed in the lower court to have it supplied; and, having done that, he may have certified up a copy thereof.[74]

Neither affidavits, nor other extrinsic evidence, will be permitted in lieu of the actual and proper contents of the transcript, upon suggestion of diminution; and only duly certified copies of papers entitled to a place in the record will be received. Thus, where it was sought to contradict an affidavit of one witness making oath to the service of notice of appeal, contained in the record, the court refused to receive the affidavit of counsel for respondent and his clerk in contradiction of it. The court said: "We must be guided by the evidence of service contained in the transcript."[75] But, as has been shown, if there be no proof of service in the transcript, the court will permit an affidavit to be served. This cannot be considered an exception to the above rule. The reasons for it are elsewhere stated.[76]

The foregoing rule forbids the introduction into the body of any document contained in the transcript, any matter not found in it, as it exists in the original on file in the court below. Thus, where, upon suggestion of diminution, it was proposed to amend the transcript by inserting in the statement

[74] Buckman v. Whitney, 24 Cal. 267. To same effect, Bonds v. Hickman, 29 Cal. 461.

[75] Matter of Fifteenth Avenue Extension, 54 Cal. 179. See, also, Boston v. Haynes, 31 Cal. 107.

[76] See chapter 39.

the instructions in the case, which had been
ing up the statement on motion for new trial, t
"Respondent presents certain instructions havi
bearing on the rights of the parties, which ar
davit to have been given to the jury at the r
lants' counsel, but which were never introduce
ment on motion for new trial, and moves for
ing the said instructions to be added in the
have often held that it is no part of the provir
to amend the records of the court below. Th
court is a transcript of the record of the cour
decide the case upon the same record consider
below. The court below decided the motion fo
the statement as it is now presented. If we sl
statement by adding these instructions, we s
upon a different record, and we should not b
action of the court below, but act upon anoth
case. If we could amend the statement in thi
could in any other. But we have no means o
records of other courts. We have no authori
their records are or shall be. We can only a
script of the record as it exists in the lower cou
ticated in the mode prescribed by law."

§ 645. Surplusage in the transcript.

However much it may tend to hinder and
eration of the questions presented for review,
in a transcript does not invalidate it. And ye
a duty, but to the interest of the appellant, to
tion therein of matters not required to perfect
law. Matters of inducement and matters sup
planatory, or to throw light on the questions ra
to confuse and divert the attention of the c
which it must and will solely consider, in comir
It is usually more to the interest of the ap

77 Satterlee v. Bliss, 36 Cal. 489, 521. To same
v. Patterson, 54 Cal. 542, 545. Failure by inadv
the abstract is no ground for striking it out, the r
plained and new abstract properly indexed present
Duxberry, 14 S. Dak. 222, 85 N. W. 221.

the respondent to have surplusage stricken out, after it has found its way into the transcript; but, unless the respondent moves to that effect, it is not known how the appellant can get rid of it, except by designating it on oral argument, or in the briefs, and asking the court to disregard it. Few appellate courts would permit a physical mutilation of the record. Surplusage will usually be disregarded by the court, and, along with it, sometimes, some of the matter entitled to be considered.

It is never difficult to determine whether given matter has place properly in the record. To determine the question, it is only necessary to consider it in the light of, and by comparison with, the statute designating what copies shall be furnished the court on appeal.[78]

[78] See ante, § 638; Taylor v. McCormick (Idaho), 64 Pac. 239; Underwood v. David, 9 Wyo. 178, 61 Pac. 1012. Party may be refused costs for printing unnecessary papers in transcript: Taylor v. McCormick (Idaho), 66 Pac. 805; Johnson v. Gilmore, 6 S. Dak. 277, 60 N. W. 1070; Aldrich v. Wilmarth, 4 S. Dak. 38, 54 N. W. 1051.

CHAPTER 39.

DISMISSAL OF APPEALS.

§ 646. Grounds for mostly jurisdictional—Genera
ject.
§ 647. Want of jurisdiction of subject of appeal.
§ 648. Want of jurisdiction of parties.
§ 649. Failure to file or serve transcript.
§ 650. Defectiveness of transcript as ground for d
§ 651. Dismissal for failure to serve transcript.
§ 652. Loss of interest by appellant as ground—
appeal.
§ 653. Dismissal of appeal prematurely taken.
§ 654. Failure of appellant to file points and aut
§ 655. Miscellaneous grounds for dismissal.
§ 656. Who may move for dismissal.
§ 657. Motion to dismiss—How made.
§ 658. Proper time for motion to dismiss.
§ 659. Relief from default on ground of mistake
in response to motion to dismiss.
§ 660. When respondent estopped from asking
herein of waiver.
§ 661. Same subject—Construction of stipulation
§ 662. Hearing and disposal of motion—Best e
Grounds must be specified.
§ 663. Hearing and disposal of motion—Appearan
ited.
§ 664. Hearing and disposal of motion—When a
record consulted.
§ 665. Hearing and disposal of motion—How mot
fective record may be met.
§ 666. Hearing and disposal of motion—What
transcript—Form of presenting same.
§ 667. Hearing and disposal of motion—Use of affi
§ 668. Effect of dismissal.
§ 669. Renewal of motion.

§ 646. Grounds for mostly jurisdictional—General view of subject.

The subjective jurisdiction of the supreme court of California is fixed by the constitution; the method by which the exercise of that jurisdiction may be invoked, and the conditions upon which that court can be set in motion to exercise it in particular cases are prescribed and regulated by statutes and court rules. Where there are statutory provisions on the subject, they are exclusive; when there are none, that court may adopt rules which are within their sphere of operation of the same force and effect as if found in a statute or even in the constitution.

Upon first suggestion, it may be strange doctrine that the mere failure to comply with conditions imposed by court rules are objections going to the jurisdiction. But upon a further consideration, it is seen that where the legislature has relegated the subject to the court, and the court, under the constitution, is vested with the power, its power to prescribe in rules, conditions upon which it will exercise the jurisdiction is as full as is that of the legislature to prescribe them. There is this difference, however, between a statute or constitutional provision and a court rule; the court may suspend the latter at will, but cannot in any way disregard or qualify the former.

If an appeal be attempted, and be not perfected in accordance with all the conditions thus prescribed, whether by statute or rule, that court does not become vested with complete jurisdiction of the case for the purposes of review, and the abortive appeal will be dismissed.

A motion to dismiss the appeal for want of jurisdiction is, in most cases, merely a convenience, because, if the court really lacks jurisdiction, it may as well be suggested in argument or in the briefs as by motion. The convenience of having the objection disposed of on motion consists in the fact that the time for hearing argument on the merits is thereby saved.

There is a distinction between jurisdiction of the subject and of the person. Jurisdiction of the subject cannot be waived. It is otherwise, as it is in all courts, with respect to the person; and if a respondent desires to raise the latter jurisdictional point, he must, in most cases, do so by motion to dismiss. If,

however, a party, to be adversely affected by a
fication of the judgment or order, be not serve
of appeal, a different question is presented
a respondent defectively served, or not served i
fails to object by motion. In the former case,
amounts to something more than a want o
persons. The whole appellate proceeding is
if no attempt had been made to serve any ad
such defect may be called to the attention of
way, and at any stage.

§ 647. Want of jurisdiction of subject of ap

The term "subject matter" is used here in
an appeal were prosecuted in a case where the
not conferred jurisdiction upon the supreme
stance, in case of a misdemeanor prosecuted o
indictment or information, that would be one
the court would lack jurisdiction of the sub
an appeal were attempted from an order fro
the constituion nor any statute had provided
court would lack jurisdiction both under the
the statute. If a transcript were filed containi
ord on appeal from a judgment or an ord
statute, but the appellant had failed to file the
taking, or had omitted any other step, that w
sense in which the court would lack jurisdictio
matter; or, perhaps, it would be more proper t
ure would defeat jurisdiction of the subject.
a fourth sense in which it would be said that
failed, jurisdiction of the subject—namely, wh
attempted by one who supposes himself to be
order or judgment, but was not a party orig
taken no step in the lower court to connect h
proceedings. It is doubtful, however, if the
should take cognizance of so vain an attempt
view, even to the extent of ordering a dismiss
are instances in which the lack of standing and
would-be appellants have been pointed out u
dismiss, and even upon submission.

The objection that the time has passed within which an appeal might have been taken cannot be waived in the supreme court as can the plea of the statute of limitations in the lower court. A failure to appeal within the limited time defeats the jurisdiction of the subject matter as effectually as if the appeal were attempted from a nonappealable order, and will result in a dismissal of the appeal, no matter how or at what stage the defect is called to the court's attention.[1] Nor is it within the power of the parties to extend the time by stipulation.[2]

The failure to comply with any plain statutory requirement with reference to the undertaking on appeal also goes to the court's jurisdiction of the subject, and will necessitate a dismissal, unless the defect or omission be of such character as to permit of its being supplied or cured upon being pointed out in the appellate court.[3] And if the undertaking be radi-

[1] See Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8, 17 Pac. 932; Bornheimer v. Baldwin, 38 Cal. 671; Bates v. Gage, 49 Cal. 127; Preston v. Hurst, 54 Cal. 595; Douglas v. Fulda, 54 Cal. 589; Emerson v. Bergin, 71 Cal. 335, 12 Pac. 242; Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Gray v. Winder, 77 Cal. 525, 20 Pac. 47; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. 880; Kirman v. Hunnewill, 91 Cal. 157, 27 Pac. 587; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 756; Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757; Hunter v. Milam, 133 Cal. 606, 65 Pac. 1079; Balfour v. Eves, 4 Idaho, 488, 42 Pac. 508; State v. Dupuis (Idaho), 65 Pac. 65; Schatzlein (Charles) Paint Co. v. Passmore, 26 Mont. 500, 68 Pac. 1113; Morris v. McLaughlin, 25 Mont. 151, 64 Pac. 219; Ramsey v. Burns, 24 Mont. 234, 61 Pac. 129; Warren v. Humble, 26 Mont. 495, 68 Pac. 851; Blyth etc. Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; Griffith v. Seattle Nat. Bank etc. Co., 16 Wash. 329, 47 Pac. 749.

[2] Langan v. Langan, 89 Cal. 366, 26 Pac. 764.

[3] See Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935; Meyer v. San Diego (City of), 130 Cal. 60, 62 Pac. 211; Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Graham v. American Surety Co., 28 Wash. 735, 69 Pac. 365; Glover v. Cove, 16 Wash. 323, 47 Pac. 737; Home Sav. etc. v. Burton, 20 Wash. 688, 56 Pac. 940; Kasch v. Nelson, 20 Wash. 315, 55 Pac. 118; Ramage v. Littlejohn, 16 Wash. 702, 47 Pac. 888; Savage v. Graham, 14 Wash. 323, 44 Pac. 540.

cally defective, so that it is equivalent to a to

In Stackpole v. Hermann, supra, the facts upon
miss the appeal as they appear from the report o
follows: Judgment herein was entered in the su
8, 1899, and on June 23d, an order denying the
for a new trial was made. June 27th, the defenda
plaintiff a notice of appeal from both the judgm
and on the next day filed the same with the cle
filed with the clerk an undertaking on appeal in
it did not show the date upon which it was execu
of the sureties annexed to their undertaking wa
and it must be assumed that the undertaking was
later than that date. At that time, however, there
made denying a new trial, and there was, ther
appeal therefrom, or consideration for an unde
appeal: Citing Clarke v Mohr, 125 Cal. 540, 58 P
facts the court dismissed the appeal from the or
trial, and denied the motion to dismiss the appeal
saying: "Prior to the hearing of this motion, the a
in an undertaking on appeal, which had been app
justice, and upon that ground asks that the moti
the undertaking on the appeal from the order wh
filed herein was without any consideration to su
therefore, incapable of sustaining the appeal, there
'insufficiency' in the undertaking, and it must be
same effect as if no undertaking had been filed. It
tion upon the sureties, and gave to the responde
cover from them the costs and damages to which
titled if the judgment should be affirmed, or t
missed. Such want of validity in the instrumen
the entire want of an undertaking, and the appell
by virtue of section 954, to supply its absence by
taking: Home etc. Associates v. Wilkins, 71 Cal.
Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543.
the undertaking on appeal from the judgment t
by the sureties before the notice of appeal was giv
in Clarke v. Mohr, supra, and held to be unten
of chapter 61 of the Laws of Washington, of 1893,
that "an appeal in a civil action or proceeding
effectual for any purpose unless at or before th
notice of appeal is given or served, or within five d
appeal bond to the adverse party conditioned . . .
clerk of the superior court." In Home Savings
tion v. Burton, 20 Wash. 688, 690, 56 Pac. 940, the
the motion to dismiss the appeal was for a suppo
with the statutory provision on the subject of justi

an undertaking, the appeal will be dismissed.[4] Minor defects will be disregarded,[5] or may be overcome by filing a new undertaking.[6]

An appeal will be dismissed where the record discloses that the amount involved is not within the appellate jurisdiction of the court.[7] So an appeal purporting to be taken from a portion of a judgment refusing to grant certain relief, which refusal is not in terms included in the judgment, and only appears from an order striking an averment from the complaint, the matter of which thereafter formed no part of the record, the cause having been tried upon the issues presented by the remaining averments of the complaint, is not properly taken, and will be dismissed.[8]

§ 648. Want of jurisdiction of parties.

A dismissal for want of jurisdiction of persons can only be based upon a failure to serve a party entitled to service with

after service of notice of filing the undertaking upon the respondent. The court gave its views upon the subject as follows: "As to the second ground, we find no provision in the statute for the dismissal of an appeal for want of service of the appeal bond on the adverse party. The statute does provide, however, that any respondent may except to the sufficiency of the surety or sureties in an appeal bond within ten days after the service on him of the notice of appeal, or within five days after the service on him of the bond or written notice of the filing thereof; but the most that can be claimed for this provision is that it permits the respondent to except to the sufficiency of the sureties in the bond after the expiration of the time elsewhere prescribed by the statute. The law provides, and every respondent must take notice, that an appeal in this state becomes ineffectual for any purpose unless a proper appeal bond is filed within five days after the giving or serving of the notice of appeal; and there is, therefore, no apparent reason for dismissing an appeal for want of service of the bond, and no provision has, as we have stated, been made for such dismissal."

[4] Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241.

[5] Paul v. Cragnas, 25 Nev. 293, 59 Pac. 857, 47 L. R. A. 540; rehearing denied, Paul v. Cragnas, 25 Nev. 293, 60 Pac. 983; Northern Counties Investment Trust v. Hender, 12 Wash. 559, 41 Pac. 913, distinguished; Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435.

[6] See ante, § 554.

[7] Issenhuth v. Baum, 10 S. Dak. 340, 73 N. W. 96.

[8] Bank of Visalia v. Curtis, 131 Cal. 178, 63 Pac. 344.

the notice of appeal within the time allowed by law. An objection that parties to the action below, other than a respondent regularly served, were entitled to service, is more in the nature of a plea in abatement than the subject of a dismissal, but is treated under this head for convenience.

There appears to be no positive decision in California to the effect that proof of service of the notice of appeal must be filed with the clerk of the lower court; and the clear inference from some of the later cases is that such filing is not essential to the jurisdiction.[9]

In some states, however, a filing of the proof of service is expressly required by statute; and under such statute a failure of compliance is a ground for dismissal.[10]

The necessity for service, and the question of what constitutes service, have been briefly discussed elsewhere, and will not be here enlarged upon.[11] As previously stated, the general law governing the service of notices and papers governs herein. A few illustrations will be found in the note below.[12]

9 See ante, § 638.

10 See Best v. Best, 22 Wash. 695, 60 Pac. 58; Merchants' Nat. Bank v. Ault, 14 Wash. 701, 44 Pac. 129; Kasch v. Nelson, 20 Wash. 315, 55 Pac. 118; Voorhees v. Manti City, 13 Utah, 435, 45 Pac. 564.

11 See ante, §§ 536, 540, 541.

12 Affidavit of service must positively state service, and not merely that the affiant believes he served the notice: Pacific Mut. L. Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398. Upon a motion to dismiss the appeal, in Heinlin v. Heilbron, 94 Cal. 636, 30 Pac. 8, upon the ground that the notice of appeal was served by mail, and was not properly served, because addressed to the attorney for the respondent, at a place other than in which he resided, or had an office, the affidavit of respondent's attorney showed that he received a copy of the notice at his office where he resided, the letter containing the notice having been forwarded to him through the postoffice. It was held that the affidavit was equivalent to an admission of service indorsed by him upon the original notice, establishing that there had been a personal service upon him of such notice, and that the court had thereby obtained jurisdiction of the appeal, and the motion was denied. An affidavit of service by mail, which fails to fully set forth the conditions upon which such form of service is authorized is insufficient: Linforth v. White, 129 Cal. 188, 61 Pac. 910; Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138.

Jurisdiction may also fail because of a failure to make proper substitution of and service upon the personal representative in the case of the death of the respondent.[13]

There may be some doubt whether a failure to serve some of those entitled to service of the notice of appeal, others having been served creates a defect of jurisdiction of parties or of the subject matter. But inasmuch as it is an omission which usually cannot be remedied or waived, and is fatal to the jurisdiction, the distinction is of no practical importance.[14]

It is well settled in California that an offer of necessary parties to the appeal who were not served with the notice to become parties in the appellate court will not remedy the omission to serve them.[15] It is otherwise in Washington and Utah.[16]

13 See Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568; also post, §§ 704, 705; ante, § 546.

14 See Bowering v. Adams, 126 Cal. 653, 59 Pac. 134; Miller v. Thomas, 73 Cal. 437, 15 Pac. 55; Conrad v. Pacific P. Co., 34 Or. 337, 49 Pac. 659; 52 Pac. 1134; 57 Pac. 1026; Smith v. Beard, 21 Wash. 204, 57 Pac. 796; Watson v. Pugh, 9 Wash. 665, 38 Pac. 163.

In the first case, Temple, J., delivering the opinion of the court and dismissing the appeal, said: "It is obvious that, if appellants are entirely successful in their appeal, they will be at liberty to claim and in fact to appropriate to their special use, to the exclusion of all other parties, the entire amount of water which is disposed of by the decree, and thus prevent the possibility of there being any surplus water to be divided among the defendants, who, by the decree, are not given prior rights, and who were not served with the notice of appeal. It is also obvious that to whatever extent they so succeed in modifying the decree, the effect will be to place them in a position to claim some portion of the water, already developed, or to be hereafter developed, to the prejudice of the defendants not served. Indeed, it is difficult to see how they can be benefited by any modification of the judgment, except to the injury of such defendants." In Smith v. Beard, supra, the court said: "Motion is made to strike the statement of facts and dismiss this appeal for the reason that all the parties who appeared in the case below, and against whom the judgment was taken, did not join in the appeal of appellants, or were not served with notice of appeal by the appellants. The appeal, therefore, must be dismissed under the rule announced by this court in Winters v. Gray's Harbor Boom Co., 19 Wash. 346, 53 Pac. 368, and many other decisions of this court."

15 See ante, §§ 536-538.

16 See Spokane etc. Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac.

§ 649. Failure to file or serve transcript.

Unguarded language is sometimes found in
the effect that the filing of the transcript withi
by statute or court rule is essential to the exer
tion. It is obvious, however, that jurisdiction
question can arise with reference to the trans
pellate courts make numerous orders having
transcript prior to its being filed, or even pre
But a failure to file it in proper time is juris
same sense as would be a failure to file an unc
lower court; that is to say, it defeats the juri
is acquired. At any rate, a failure to file the t
the time so fixed, or extensions thereof, is us
for dismissal.[17] Extension of time on accou
bills of exceptions or statements is elsewhere

The filing of the transcript on the day of se
tion to dismiss is not sufficient answer to the m
a matter of fact, it was filed prior to such servi

1119; Watterson v. Masterson, 15 Wash. 511, 46 Pac
P. & S. Works v. Samuelson, 16 Utah, 119, 51 Pac.
peal which is defective for failure to serve noti
intervening defendants cannot be cured by dism
veners from the action, at their request, after the
perfected: Old Nat. Bank v. O. K. Gold-Min. Co
52 Pac. 1065.

17 Smith v. Arnold, 60 Cal. 234; Smith v. Solon
24 Pac. 286; Buckley v. Althorp, 86 Cal. 643, 25 Pa
Ohm, 89 Cal. 134, 26 Pac. 649; Bethel v. Rogers, 100
645; Emeric v. Alvarado, 106 Cal. 646, 40 Pac.
Montgomery, 116 Cal. 120, 47 Pac. 1006; Estate of
584, 65 Pac. 1081; Bell v. Southern Pac. R. R. Co., 13
692; Pence v. Lemp, 4 Idaho, 526, 43 Pac. 75; Sha
26 Mont. 45, 66 Pac. 496, 761; Close v. Close, 28 Or.
Bonesteel v. Fairchild, 9 Utah, 371, 36 Pac. 633; Uta
v. Morgan, 9 Utah, 369, 36 Pac. 632; Howell v. Cla
52 Pac. 631; Ocosta (Town of) v. Redfield, 10 Wash.
Wheeler v. Commercial Inv. Co., 22 Wash. 546, 61
California court rules: Time for filing in civil c
rule 2, subd. 1; criminal cases, thirty days, rule
missal for failure to file, rule 5, printed 130 Cal.

18 See ante, § 642.

19 Chapman v. Bank of California, 88 Cal. 419, 26
v. San Francisco etc. R. R. Co., 87 Cal. 610, 25 Pac.

The rules of the California court, except where the method of delivering the transcript and funds for printing the same to the clerk of the supreme court is provided for, refer to the printed transcript. And where an order of the court, extending the time within which to serve and file a transcript on appeal, was made upon an application and affidavit showing that the manuscript of the transcript was ready, but that additional time was necessary in order to have it printed, and the appellant, instead of filing a printed transcript and serving it upon the respondent within the extended time, merely delivered to the clerk of the court one manuscript copy, paying to him the amount required for printing, the appeal was dismissed for failure to serve and file the transcript within the proper time.[20]

The necessity for, and method of serving the transcript, need not be here discussed. The subject has been elsewhere noticed, so far as was deemed advisable.[21] A failure to serve, equally with a failure to file the transcript, is a ground for dismissal.[22]

§ 650. Defectiveness of transcript as ground for dismissal.

An appeal, though taken according to law, will be dismissed upon, or even without, a motion, if upon a bare inspection of the record it is apparent that it presents nothing for investigation or decision. A transcript containing such a record is treated as is a complaint which entirely fails to state a cause of action. The only difference is that while the trial court acts upon a written demurrer, or some appropriate motion, the supreme court may act either upon a motion, or upon an oral demurrer presumed to be interposed at every stage of the proceeding. This practice has not always been followed, but

transcript filed a few hours later on, same day; Ward v. Healy, 110 Cal. 587, 42 Pac. 1071. Held appeal should not be dismissed merely because transcript filed before appeal perfected: Nottingham v. McKendrick (Or.), 57 Pac. 195.

20 Rumfeldt v. Trinity Riv. etc. Co., 83 Cal. 649, 24 Pac. 276.

21 Ante, § 642.

22 Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341. This was a case involving service of a notice of appeal, but the opinion, which is very concise and full, is equally applicable to transcripts and all other papers requiring to be served.

it has been observed in most cases. In Casgra
the appeal from an order denying a new tria
after final submission, because the appeal
ment had been previously dismissed, and a
statement on the appeal from the order, there
the court to review. This ruling was warran
substantially the same as the present rule 14,
follows:

"Exceptions or objections to the transcript,
bond or undertaking on appeal, the notice of
service, or any technical exception or objection
civil cases, affecting the right of the appellant
the points of error assigned, which might be
gestion of diminution of the record, must be tal
to the appellant, in writing, at least five days
ing, or they will not be regarded; and when so
be the duty of the appellant to present and file
of the cause such additional record, certificate,
if such there be, to remove or answer the objecti
so taken; otherwise, such objection or exception
shall prevail."

It will be seen that the word "statement" is
there are no longer any statements on appeal.
motion for new trial come within the term.
mentioned bill of exceptions also?

But "any technical exception or objection to
civil cases, affecting the right of the appellant
the points of error assigned, which might be cu
tion of diminution of the record," is also mention
of exception. The rule, after providing for no
pellant, makes it the duty of the appellant to
cure the defect, and concludes with the words "
objection or exception, if well taken, shall preva
stated to what effect it shall prevail. It is evi
that in case, for instance, of an appeal from an
a motion for a new trial an exception might be
affidavits in the statement or bill of exceptions,

23 30 Cal. 509, distinguished and held inapplicabl
Ford, 2 Or. 252, 255.

of the record, as to which the judge's certificate negatived any inference that they were read or used on the motion, and not well taken as to grounds supported by other portions of the statement or bill. In that case the appeal from the order could not be dismissed, but consideration of the grounds supported by the affidavits would be dispensed with. But if the transcript did not contain any certificate whatever by the judge, and one were not produced and presented, the appeal would have to be dismissed. So it is seen that whether an appeal can be dismissed for defects in the transcript depends upon whether the defect is partial or such as to invalidate the entire record. And this view has prevailed in practice.

Most of the defects which, if not corrected, warrant a dismissal, are found either in the clerk's certificate to the transcript, or to the judge's certificate to the bill of exceptions, or statement, for instance, where there is no certificate whatever showing that the papers in what is called the transcript are copies of the originals filed in the lower court.[24]

But the body of the transcript may be otherwise so defective as to necessitate a dismissal; as where it does not contain any appealable order or judgment;[25] or there is nothing to show that a notice of appeal was filed or served;[26] or the record fails to show any matter in dispute between the parties;[27] or does not contain either verdict or judgment, the appeal being from the judgment;[28] or, disregarding rules of court, an abstract does not show that any motion for a new trial was made, there being no appeal from the judgment;[29] or there is no bill of exceptions, nor anything to show that any exception was taken.[30] It is held, however, in South Dakota, that it is not essential that the jurisdiction of the appellate court affirmatively appear in the judgment-roll if the contrary be not made

24 In re Wierbitszky, 88 Cal. 333, 26 Pac. 174.

25 Clyne v. Bingham County (Idaho), 60 Pac. 76; Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624.

26 Beets v. Charts, 79 Cal. 185, 21 Pac. 730.

27 Matter of Siering, 90 Cal. 207, 27 Pac. 204.

28 Buckley v. Conley, 16 Wash. 338, 47 Pac. 735.

29 Anderson v. Dubois, 10 Utah, 60, 37 Pac. 90.

30 Welsh v. Lambert, 18 Utah, 1, 54 Pac. 975.

to appear;[31] and in North Dakota the objection
ment on appeal is defective is not ground for d
appeal.[32]

There are many defects and omissions in tra
although they give just ground for objection, an
dismissal upon final consideration, yet cannot b
consideration without an examination of the
Where such is the case, the motion will usually b
out prejudice, of course, to the right of the m
have his objections subsequently considered by t

Though a transcript be unobjectionable on the
pleteness and sufficiency, or the time of serving
yet there may have been such a total disregard
ments of the rules in the preparation of it as to
missal.[34]

If there be one transcript on two appeals
taken together, both appeals cannot be dismiss
record be so defective as to prevent a considera
them; as where the plaintiff appealed from a jud
of the defendant and also from an order denyin
and the transcript did not disclose that any bil
or statement on motion for a new trial was se
fied.[35] And, generally speaking, in order to
missal under the present head the record must
or incomplete as to leave nothing for the proper
of the appellate court.[36]

31 Scaman v. Galligan, 8 S. Dak. 277, 66 N. W. 45

32 Northern Pac. Ry. Co. v. Lake, 10 N. Dak. 541,

33 As to which, see, post, § 664.

34 See Green v. McMann, 79 Cal. 561, 21 Pac.
lineations and erasures in the printed transcript, n
transcript was certified by the clerk or filed, and whic
respect render the record difficult to be read or unde
render the transcript so irregular in character as to
missal of the appeal: Fogel v. Schmalz, 83 Cal. 201,

35 Taney v. Vollenweider, 24 Mont. 367, 62 Pac. 41

36 See Zienke v. Northern Pac. Ry. Co. (Idaho)
Bailey v. Littell, 24 Nev. 294, 53 Pac. 308; Denver
United States, 9 N. Mex. 309, 51 Pac. 679; Byers
Or. 77, 65 Pac. 1067, 68 Pac. 5. Appeal from judg

§ 651. Dismissal for failure to serve transcript.

There is no statute or rule expressly allowing a dismissal of the appeal for a failure to serve the transcript. But subdivision 1 of rule 2 expressly requires service within forty days after the appeal is perfected. Subdivision 3 provides for an extension of the time. Subdivision 2 of rule 2 provides that "written evidence of the service, upon the adverse party, of the transcript, shall be filed therewith; and the first sentence of rule 11 reads as follows: "Before the transcript (in cases in which a printed transcript is required) is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party appearing by different attorneys, upon the attorney for each party so appearing." These provisions, especially the last quoted, must be construed to prohibit the filing of the transcript without proof of service, so that the transcript is not legally filed at all unless filed with proof of service.

§ 652. Loss of interest by appellant as ground—Waiver of right to appeal.

If by any means it be shown to the appellate court that the only question before it is an abstract or moot question, the appeal will be dismissed.

The usual way in which a real question becomes one of no immediate consequence to the parties, and therefore moot or abstract, is by a loss of interest, of which the decisions afford

proceedings to determine heirship, will not be dismissed upon the grounds that the superior court has no jurisdiction to entertain proceedings after the court has rendered an affirmative judgment therein: Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206. Cited in Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221. In the above case of Bailey v. Littell the ground relied upon for a dismissal was that the judgment as entered did not specify the amount of the costs. The court in denying the motion said: "The judgment, as entered, appears above, and as to costs it is, to wit, 'and for her costs of suit,' no amount being named therefor. It appears that the cost-bill was filed in due time by the plaintiff after the entry of said judgment by the clerk, and the defendants duly moved the court to retax the costs, but subsequently withdrew their motion. The clerk should have inserted the amount of plaintiff's cost-bill in the judgment after the defendants had withdrawn their motion to retax. Not having done so is not legal ground for dismissing the appeal."

numerous examples.[37] A good illustration of
of the rule is where a plaintiff has accepted
paid by the defendant, as for costs and expen
tion of an order setting aside a judgment by de
case the plaintiff will be deemed to have consent
and to have waived the right of appeal, and h
from and from a subsequent order, which wa
proper showing, reciting the fact of such payme
the order absolute, will be dismissed.[38] The p

37 See San Bernardino (County of) v. Riverside
Cal. 618, 67 Pac. 1047; Estate of Shaver, 131 Cal.
Storke v. Storke, 132 Cal. 349, 64 Pac. 578; Fost
Cal. 611, 47 Pac. 591; In re Treadwell, 111 Cal. 1
Moore v. Morrison, 30 Cal. 80; Bank of Martinez
238, 38 Pac. 41; Estate of Baby, 87 Cal. 202, 22 A
25 Pac. 405; Williams v. Williams, 6 N. Dak. 2
Moores v. Moores, 36 Or. 261, 59 Pac. 327; Wedekin
69 Pac. 612, case of dismissal after argument and
Cormick v. Snedigar, 3 S. Dak. 302, 53 N. W. 83, c
istrator appealed after his final discharge; Camp
Wash. 626, 69 Pac. 12; State v. Wickersham, 16 W
421; State v. Meachen, 17 Wash. 429, 50 Pac. 52;
Wash. 163, 47 Pac. 424; State ex rel. etc. v. Cum
316, 67 Pac. 565, holding that where the term of
which was involved in a contest over the right t
from the judgment in the cause will be dismissed,
there being no subject matter on which the judgmen
court can operate; Campbell v. Hall. 28 Wash. 626,
son v. Merkle, 21 Wash. 635, 59 Pac. 484; Sether v.
16, 63 Pac. 1106; Motion to dismiss not necessary
shown by the record not to be aggrieved by de
Sisson, 8 S. Dak. 476, 66 N. W. 1087. The suprem
to have no jurisdiction of an appeal in an action
tainer and for twenty-four dollars, where subsequen
judgment for defendants, possession of premises
so that the remaining controversy was only as to re
four dollars: Puyallup Light Heat etc. Co. v. Ste
604, 59 Pac. 504.

38 Estate of Shaver, 131 Cal. 219, 63 Pac. 340;
132 Cal. 349, 64 Pac. 578. In the second case the
other reason exists why the appeal from the orde
for a new trial should be dismissed. Defendant a
of the judgment that was beneficial to her. It was
and by its terms gave her $450. This sum was bas
ing, and was the result of the litigation. Defenda

ing herein was well stated in San Bernardino (County of) v. Riverside (County of),[39] as follows: "The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other. The rule and the principle upon which the rule rests are the same, whether such judgment be the final determination of the cause or an intermediate order made in the course of the procedure. A party cannot accept the benefit or advantage given him by an order, and then seek to have it reviewed. After receiving the money which the court has directed to be paid to him, he will not be heard to say that the court erred in making such order, and if by the order a right or favor is given to the other party as the consideration for making such payment, the party receiving the money will be held to have assented to a granting of the favor or right." The correct limitation of this rule, stated in the same case, is as follows: "Where a reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby, as, for example, where there is no controversy as to his right for the amount

and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. It may have been as great a hardship to plaintiff to have paid the $450 as it would be to a wealthy man to pay $450,000. If the defendant should procure a new trial, she would still have the $450, and the plaintiff would not have his divorce. If she has used it, or is otherwise unable to pay it back, the plaintiff cannot be placed in the same condition in which she was before the trial. The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it: Bennett v. Van Syckel, 18 N. Y. 481; note to Clark v. Ostrander, 13 Am. Dec. 548; 2 Freeman on Judgments, sec. 480a; People v. Burns, 78 Cal. 646, 21 Pac. 540; In re Baby, 87 Cal. 202, 22 Am. St. Rep. 239, 25 Pac. 405; Estate of Shaver, 131 Cal. 219, 63 Pac. 340." This case in its facts and conclusion reached is very similar to that of Bourne v. Simpson, 9 B. Mon. 454. Within the same principle are cases where a party appeals from a judgment granting a divorce to the other party and then marries: See Garner v. Garner, 38 Ind. 139.

[39] 135 Cal. 618, 67 Pac. 1047. To same effect, Estate of Shaver, 131 Cal. 219, 63 Pac. 340; Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

for which the judgment was given, but he clai
entitled to a greater amount, he is not preclud
peal, even though he has received the amoun
To terminate the right to maintain the appe
must have been made and accepted by way of
with an agreement not to take or pursue an app

A mere transfer of interest may warrant a
substitution, but it is seldom, if ever, a ground

40 Warner v. Freud, 131 Cal. 639, 82 Am. St. R
1017. See, also, Peck v. Agnew, 126 Cal. 607, 59
that mere cessation of powers as special administ
for dismissal; Merriam v. Victory Min. Co., 37 Or.
58 Pac. 37, 60 Pac. 997; In re Day, 18 Wash. 359, 5
son v. Dale, 9 Wash. 379, 37 Pac. 475. In the abo
v. Victory Min. Co., the rule and its qualification wer
"The rule is well settled in this state and elsewh
who receives a substantial benefit or the fruits
cannot be heard to complain of the action of the
him the award or judgment. The right to proceed
or decree, and invoke the process of the court t
thus acquire or otherwise secure and enjoy the fru
ment or decree and the right to appeal therefrom, a
and wholly inconsistent; so that an election to enf
the court, and to secure the benefits awarded, ac
extent that an appropriation has been accomplishe
tion of, and precludes, the right of appeal: Moore
260; Ehrman v. Astoria Ry. Co., 26 Or. 377, 38 P
Mitchell, 28 Or. 92, 41 Pac. 155. The rule, howeve
tate against the right of appeal by a party who ac
voluntarily tendered or paid on a judgment or de
is not inconsistent with the acceptance of the amo
be due by the pleadings in the case: Portland Cons
24 Or. 54, 32 Pac. 764; Stemmer v. Scottish Ins. C
Pac. 588, 53 Pac. 498; the purpose of the appeal b
ment of a contested or disputed right, and such
merely to that which is conceded by all parties t
In consonance with this right is the right also to
fits awarded by the judgment or decree, and, at
prosecute the appeal, where that which is awarded
the appellant in any event; that is, whether a reversa
affirmance be obtained: Stemmer v. Scottish Ins. C
Pac. 588, 53 Pac. 498; Hinchman v. Point Defiance R
349, 44 Pac. 867, 869; In re Day, 18 Wash. 359, 51

41 See Heilbron v. '76 Land etc. Co., 96 Cal. 7, 3
Carthy v. Speed, 12 S. Dak. 7, 80 N. W. 135. In th

An enforced satisfaction of the judgment from which a defendant has appealed cannot affect his right to maintain it, or deprive him of any of its benefits.[42] And where a defendant had deposited money in court to make good a tender, and the court, without the consent of defendant, applied such money pro tanto upon a judgment recovered for a greater sum, it was held that the acceptance of such money by plaintiff did not operate as a satisfaction of the judgment, or to deprive the de-

court said: "The respondents ask that the appeal be dismissed, because, having conveyed away its canal and water right, 'the appellant is no longer the party in interest, and is not a party aggrieved by the judgment.' We do not think the appeal should be dismissed for the reason stated. After the transfer it was proper that all proceedings in the case, including the appeal, be taken for and on behalf of the grantee, in the name of the original defendant; and in the absence of any showing to the contrary, it will be presumed that they were so taken: Malone v. Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063."

42 See Kenny v. Parks, 120 Cal. 22, 52 Pac. 40; Fenton v. Morgan, 16 Wash. 30, 47 Pac. 214. In the first case the court said: "The respondent now moves to dismiss the appeal upon the ground that after the entry of the judgment, and prior to taking the appeal, the judgment was satisfied; and in support thereof presents an affidavit showing that by virtue of an execution issued upon the judgment the sheriff had placed the plaintiff in possession of the land recovered by her in the action, and that by virtue of a levy under said execution, upon certain personal property of the defendants against whom the money judgment was rendered, had received and paid to the plaintiff the amount of the judgment, and that a satisfaction of said judgment had been acknowledged upon the margin of the record by her attorney. The defendants had the right to appeal from the judgment against them at any time within one year from its entry, and, by section 957 of the Code of Civil Procedure, in case of a reversal of the judgment are entitled to a restitution of all property and rights lost by reason of the judgment. The plaintiff cannot deprive them of this right by enforcing an execution of the judgment before the time for an appeal has expired. It has been held that a party in whose favor a judgment has been rendered cannot enforce the judgment, and while enjoying its benefits, appeal therefrom and seek its reversal: People v. Burns, 78 Cal. 646, 21 Pac. 540; In re Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405. . . . . Section 1049 of the Code of Civil Procedure cannot be invoked to abridge the right of appeal where a judgment has been satisfied against the will of the appellant."

fendant of a right of appeal on the ground
the controversy.[43]

§ 653. Dismissal of appeal prematurely take

A well-established ground for dismissal is
taking of the appeal. As to when the taking
premature, a thorough discussion is had elsew
being there cited.[44] In all such cases the def
acter not to be remedied or waived, and the
dismissed upon the matter coming to the
court.[45] Nor is the defect aided by a nunc p
entry made after the appeal was taken.[46]

§ 654. Failure of appellant to file points and

In so far as it affects his status as a party
ing, the respondent, if he chooses, may allow t
ceeding to take its course. He need not file
appear at the argument, or at all. But the ap
only see that all the steps are taken which pre
record before the court, but he must follow it
serving points and authorities. His failure to
a dismissal of the appeal, though it is some
ignored by the court. The whole subject is co
reading as follows: "If the transcript of the
lant's points and authorities be not filed withi
scribed, the appeal may be dismissed, on moti
given. If the transcript, or the points and au
not filed within the time prescribed, be on file
notice is given, that fact shall be sufficient an
tion. If the respondent shall not file his poi
ities within the time allowed therefor, the ca
mitted for decision upon the motion of the app
thereof to the respondent."

43 Duggan v. Smith, 27 Wash. 702, 68 Pac. 356.

44 See ante, § 532.

45 See Bell v. Staacke, 137 Cal. 307, 70 Pac. 17
Mer. Co. v. Wines, 24 Nev. 305, 53 Pac. 177; Dye
Easton, 14 S. Dak. 520, 86 N. W. 23.

46 Martin v. Smith, 11 S. Dak. 437, 78 N. W. 1001
v. Oliver, 11 S. Dak. 444, 78 N. W. 1002.

Substantially the same requirements are prescribed as to printing, filing and serving the points and authorities as in the case of the transcript. The whole subject, both in civil and criminal cases, is fully covered by subdivision 4 of rule 2, reading as follows: "Thirty days after the filing of the transcript, and in cases where the transcript shall be on file at the date when this rule takes effect, then, within thirty days after such date, the appellant shall file with the clerk his printed points and authorities, and with it proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court. Within thirty days after the service of appellant's points and authorities, the respondent shall file and serve his printed points and authorities; and within ten days after service of respondent's points the appellant may file a reply. In criminal cases the appellant shall file his points and authorities (with proof of service of a copy thereof on the attorney general) within ten days after the filing of the transcript. The attorney general shall file and serve his points and authorities within ten days after service upon him of the appellant's points, and within five days thereafter the appellant may file and serve a reply. Such points and authorities may be either printed or written." Extensions of time are provided for by subdivision 5 of the same rule.

The court exercises a considerable latitude of discretion under the rules, but in a clear case of noncompliance and inexcusable neglect the appeal will be dismissed.[47] But if, within the time limited, a document purporting to be such points and authorities has been filed, the motion will be denied. The court will not, on such motion, examine the document so filed

[47] See Shain v People's L. Co., 98 Cal. 120, 32 Pac. 878; McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777; Pilger v. Strassman, 119 Cal. 691, 52 Pac. 40; Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; In re Sullivan's Estate, 25 Wash. 430, 65 Pac. 793; Cady v. Case, 10 Wash. 140, 38 Pac. 880; Robertson v. Shorow (Wyo.), 69 Pac. 1. And a brief which omits parts required by statute will warrant a dismissal, in Washington, as well as in Montana: Von Schrader v. Welcher, 19 Wash. 349, 53 Pac. 368; Smith v. Deniff, 23 Mont. 65, 57 Pac. 557.

for the purpose of determining its sufficiency.[48] And a motion to dismiss the appeal for failure of the appellant to file his points and authorities in the time required by the rule was denied when it appeared that between the time of a notice of a motion which was abortive, for failure to designate a day for the hearing, and the giving of a second notice, the points and authorities were filed.[49]

The rule is not enforced in Washington except some showing of prejudice be made; and there an appeal will not be dismissed merely for delay in serving and filing briefs or in the transmission of the record to the supreme court within the time limited by law, when there is no showing of prejudice to respondents by reason of the delay.[50]

48 Gregory v. Diggs, 108 Cal. 123, 41 Pac. 34. A different practice appears to pervail in Montana, where it was held that an appeal wherein the appellant's brief contains no specification of the errors relied on should be dismissed on motion of the respondent: Patterson v. Pfouts, 25 Mont. 163, 64 Pac. 222. For other dismissals for reason of defectiveness of brief, see Smith v. Denniff, 23 Mont. 65, 57 Pac. 557; Conklin v. Cullen, 25 Mont. 30, 63 Pac. 683; Rehberg v. Greiser, 24 Mont. 487, 63 Pac. 41, 62 Pac. 820.

49 Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214. See, also, Raymond v. Bales, 26 Wash. 493, 67 Pac. 269.

50 Gay v. New Whatcom, 26 Wash. 389, 67 Pac. 88. See, also, In re Alfstad's Estate, 27 Wash. 175, 67 Pac. 593; Hyatt v. Lewis, 20 Wash. 303, 55 Pac. 217; Chandler v. Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Fleishner v. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. In the first of these cases the court said: "It is true that appellant's brief was not served or filed within the time prescribed by law, and it is also true that the record on appeal was not transmitted to this court by the clerk of the court below within the time designated by statute. But it does not necessarily follow from these facts that the appeal must be dismissed. At the time this motion was made the brief of appellant had been served and filed, and the record had been transmitted to this court, and it does not appear that the respondents were in any way prejudiced by the delay of which they here complain. Under such circumstances this court has always declined to dismiss an appeal on account of mere delay in serving or filing briefs or in the transmission of the record." With reference to the rule of the Washington court requiring briefs to refer for verification to the transcript the court said in Hyatt v. Lewis, supra: "The appeal in this case was from an order sustaining a demurrer to the complaint, and, as this is the only error

§ 655. Miscellaneous grounds for dismissal.

A few other grounds of dismissal, not susceptible of classification, have sometimes arisen.

An appeal from a judgment entered in conformity to the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment.[51] And a second appeal, taken pending a former, taken from the same judgment or order will be dismissed.[52] So an appeal taken from an order on motion for new trial, in a case where no new trial can be granted, will be dismissed.[53] And it was held that an appeal should be dismissed because the transcript was not prefaced with an index as required by rule of court.[54] But such failure is usually the result of inadvertence, and, when so, the appellant should be permitted to make the index, in response to the objection, without dismissal of the appeal.[55]

§ 656. Who may move for dismissal.

Any party to the appellate proceeding may effectively move a dismissal upon an available ground. The appeal may often be dismissed as to one or more parties without being disturbed

assigned and the transcript is very short, there is little occasion for the rigid enforcement of the rule requiring briefs to refer to the pages of the transcript for verification: Froelich v. Morse, 15 Wash. 636, 47 Pac. 22."

51 Kimpton v. Jubilee Min. Co., 22 Mont. 107, 55 Pac. 918; Krantz v. Rio Grande Western Ry. Co., 13 Utah, 1, 43 Pac. 623.

52 Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; State ex rel. etc. v. King, 6 S. Dak. 297, 60 N. W. 75.

53 Estate of Heldt, 98 Cal. 553, 33 Pac. 549.

54 Standard Steam Laundry v. Dale, 20 Utah, 469, 58 Pac. 1109.

55 See Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511. In this case the court said: "The point of the second objection is, that the folios of the transcript which was on file when the notice to dismiss was served are not numbered as required by our rule. But this was an objection that should have been distinctly specified in the notice of motion to dismiss, in order to give the appellant an opportunity to amend the defect. It was not so specified in the notice, and therefore cannot be regarded. (Rule 13.) For our own convenience in examining the record we might still require the appellant to number the folios of the transcript on file, but as it is extremely brief, such an order seems unnecessary."

as to others; for instance, where there is a failure to serve the transcript or opening points and authorities on some, others being regularly served. A stipulation for dismissal between the appellant and some of the respondents may accomplish the same result.[56] But a co-respondent as to whom there has been no such default cannot take advantage of such default as to another respondent.[57] It was held that neither the appellant nor a surety on his appeal bond was entitled to a dismissal of the appeal because the appeal bond was not filed in time, such rights belonging to respondent alone.[58] On the other hand, it was held that the assignee of the judgment in favor of a mortgagor might move in his name, as respondent, to dismiss the appeal from the judgment, for failure of the appellant to file his points and authorities within the time limited by the rule, and that it was no sufficient answer to such motion to show that the respondent had filed a petition in insolvency, and that no assignee had been appointed, that fact being no excuse for failure of appellant to file his points and authorities in time.[59]

When the objection goes to the jurisdiction of the court, it appears to be held immaterial by whom the court's attention is called to the point, whether it be a party to the record or not, since the court may dismiss for that cause of its own motion at any stage of the case.[60]

Usually, the appellant will only be heard through his own attorney; but the right of the appellant to dismiss the appeal will not be denied because the motion is made by respondent's attorneys, upon affidavits showing the desire of the appellant

56 Taake v. Seattle (City of), 16 Wash. 90, 47 Pac. 220.

57 Wilson v. Wilson (Idaho), 57 Pac. 708.

58 Saylor v. Oakes, 36 Or. 410, 59 Pac. 1108. In this case the court said: "The undertaking in this case is a voluntary obligation entered into by the defendant and her surety. It is in regular form, and, having served its purpose, neither the appellant nor the surety is entitled to a dismissal of the appeal because it was not filed in time. Such right belonged to the respondent alone, and, if he saw fit to waive it, and proceed with the trial without objection, the appellant or her surety cannot take advantage of the defect."

59 Suman v. Archibald, 116 Cal. 41, 47 Pac. 865.

60 Bullock v. Taylor, 112 Cal. 147, 44 Pac. 457; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Bienenfield v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113.

for such dismissal, where the attorney taking the appeal has no special contract or charge upon the property in controversy.[61]

§ 657. Motion to dismiss—How made.

It will be noted that a motion to dismiss is a different proceeding from taking exceptions, although the latter may ultimately result in a dismissal.

The provision for a dismissal for failure to file the transcript and points and authorities was quoted in a preceding section. That for dismissal for other causes is provided for by subdivision 2 of rule 6, reading as follows: "On motion to dismiss the appeal on any other ground than the failure to file transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk of the court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavit."

The service of the notice is also provided for. "Copies of the moving papers, except the transcript, shall be served with notice of the motion."[62]

The sufficiency of the notice of the motion to dismiss an appeal must be determined by the facts in each case. If the notice have the effect to bring the appellant before the court at the time specified for hearing the motion, and upon such hearing he respond to a particular point urged for a dismissal, he will not be heard to object to the sufficiency of the notice; for instance, where it caused the appellants to attend and seek an amendment of the record in order to obviate an objection

61 Guardianship of Deguan, 132 Cal. 260, 64 Pac. 485. The court in granting the application said: "It may be conceded that the regular, orderly, and courteous method of procedure would have been for the client to give notice to her own attorney of her desire that her appeal should be dismissed, and in the event of his refusal, after notice, to procure a substitution of attorneys and through the new attorney bring the matter to the attention of the court. But the fact that the mode here adopted is unusual does not deprive the appellant of her right to a dismissal, when it is made to appear to the court, as in this case it is, that such is her desire; it not being contended that her attorney has any special contract or lien upon any property in controversy entitling him to continue the prosecution."

62 Subdivision 3 of rule 6.

that the transcript had not been filed in time, and to attempt to excuse the delay.[63] But there is a great difference with respect to the sufficiency of the notice between a case where a jurisdictional point is relied upon and one where a dismissal is asked upon a technical error in the proceedings. In the former case the form and contents of the notice are of but little importance, while in the latter the error or irregularity must be specifically pointed out in order that the appellant may propose amendments by which the objection may be obviated.[64] The appellate court will entertain an oral motion to dismiss, made without notice, at the hearing, when based upon a jurisdictional ground.[65] But if based upon other than jurisdic-

63 Bell v. Southern Pac. R. R. Co., 137 Cal. 77, 69 Pac. 692.

64 See State v. Estes, 34 Or. 196, 55 Pac. 25, 51 Pac. 77, 52 Pac. 571.

65 Matter of Castle Dome etc. Co., 79 Cal. 246, 21 Pac. 746; Hall v. Skardale, 21 Wash. 203, 57 Pac. 807. A motion to dismiss an appeal for want of a record must be made on a short record; and on ten days' notice (rule 23), and cannot be made orally at the time the appeal is called for a hearing: Cochrane v. Gunderson, 10 Wash. 326, 38 Pac. 997. Under court rule 17, directing that objections to the record must be noted in writing and filed one day before the argument of the case, and, unless so filed, must be disregarded, a motion to dismiss the appeal because the transcript does not contain all the papers constituting the judgment-roll cannot be considered where it is filed on the same day the case is argued: Richards v. Scott (Idaho), 65 Pac. 433. In the first of these cases the court said: "And we cannot hold that respondent's are precluded by rule 13 of this court from urging this objection now because they failed to make it prior to the original hearing of the case. Rule 13 cannot be held to apply to an objection which goes directly to our jurisdiction to hear an appeal. The ground upon which a respondent is allowed to object to the hearing of an appeal, because some other party adverse to the appellant has not been served with the notice of appeal, is not that his rights are affected, but merely that the court is bound at all times to keep within its proper jurisdiction, and must give heed to such objections, no matter how they are brought to its attention." In the second case the court said: "Motion is made to dismiss this action for want of jurisdiction on the part of this court to try the same. The case falls squarely within the rule announced in Pacific Supply Co. v. Brand, 7 Wash. 357, 35 Pac. 72, and the motion will therefore be sustained. It is urged by appellant that no proper service of the motion has been made, but, this being a jurisdictional question, as has often been decided by this court, the motion will be entertained, even upon an oral suggestion at the time of the trial."

tional grounds the motion should be made on the day noticed for the hearing, or at the first opportunity during the session of the court. If not so made the motion lapses, and cannot be revived at a subsequent session.[66]

There are certain formal defects which, if not cured, would result in a dismissal, which it is held need not be made the subject of a motion to dismiss, it being sufficient if the appellant's attention be called to them in a brief five days before the hearing of the appeal; for instance, the insufficiency of the clerk's certificate to the transcript.[67]

66 Lamet v. Miller, 68 Cal. 521, 9 Pac. 669.

67 San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517. In this case the certificate was as follows: "I, Thomas S. Bonneau, county clerk of the county of Marin, and ex-officio clerk of the superior court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers now on file in my office, and that the said transcript is correct." The court, after referring to the requirements of section 953 of the Code of Civil Procedure, prescribing the essentials of the certificate and pointing out the noncompliance of the above, proceeded as follows: "The appellant, instead of applying to this court, as it might have done, for leave to file a corrected certificate, contends against the motion to dismiss: 1. On the ground that, under rule 13 of this court, an objection of this kind must be taken and notified to the appellant in writing, at least five days before the hearing. The respondent has pointed out, in his printed brief, the objection to the certificate, and asks therein that the appeal be dismissed. This being done within the time required by the rule is a sufficient compliance with its provisions. A formal notice is unnecessary. 2. That as the undertaking on appeal is set out in the transcript and appears to be in due form, the certificate of the clerk that the transcript is correct is a sufficient compliance with the requirement of the code. As we have shown, the undertaking is improperly set out in the transcript, and forms no part of it. This being true, a certificate that the transcript is correct cannot be construed as certifying that a copy of a paper, not properly a part of it, is in due form and has been properly filed. The requirements of the section of the code under consideration are plain and explicit, and should be complied with. It has been held by this court that it was sufficient to set out the undertaking in the transcript, and certify to its correctness: Wakeman v. Coleman, 28 Cal. 58. But this was under an entirely different provision: Practice Act, § 346. See, as bearing on the point, Bennett v. Bennett, 42 Cal. 629. The objection to the certificate is well taken. Appeal dismissed."

The consequences of a failure to give such notice as provided by the rules cannot be avoided by the making of an affidavit by the respondent to the effect that the defect cannot be cured by a suggestion of diminution of the record, under the rules.[68]

The rule previously quoted specifically provides for the furnishing of a certificate by the clerk of the lower court where the motion is based upon the failure to file the transcript in time. The motion will usually be denied in the absence of a certificate in substantial conformity with such rule.[69] Under such rules the motion may be made at any time after perfecting the appeal. The moving party need not wait for the filing of a record in the appellate court.[70]

§ 658. Proper time for motion to dismiss.

Obviously, the motion to dismiss would be premature prior to the default which constitutes the ground for dismissal. Steps may be taken immediately upon the lapse of time allowed by statute or rule of court for doing the thing required of appellant to be done. In case of a failure to take any prescribed step to perfect the appeal prior to the expiration of the time to file the transcript, respondent need not await the expiration of that period. Subdivision 4 of rule 6 removes any uncertainty on this point. It reads as follows: "If an appeal be taken and perfected in the form required by statute, after the expiration of the time limited by law for the taking of such appeal, the respondent may, under the provisions of this rule, move to dismiss such appeal on that ground, whether the time for filing the transcript has expired or not."

68 De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787. See, also, Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

69 See Robinson v. Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; post, § 665. If the ground of the motion be the failure to file the transcript in proper time, and there be no bill of exceptions or statement on file with the clerk of the lower court, the absence of any need not be mentioned in the clerk's certificate. It was so held in San Francisco etc. Co. v. State, August 3, 1903, no record being made of the ruling except in the reporter's notes. Objection was made by the respondent to the certificate on that ground and was overruled.

70 See Murray v. Whitmore, 9 S. Dak. 288, 68 N. W. 745; Garvin v. Pettee, 13 S. Dak. 239, 83 N. W. 251, being dismissal for failure to prosecute appeal.

§ 659. Relief for default on ground of mistake, inadvertence, etc., in response to motion to dismiss.

The right of appeal is conferred by the constitution, and statutes and rules of procedure for its exercise are to be liberally construed; and no appeal will be dismissed on technical grounds, where there has been no violation or disregard of any express rule of procedure.[71]

To entitle the respondent to a dismissal, his showing that the statute or rule in question has not been complied with must be clear and conclusive; and the court will, where possible, give consideration and effect to whatever is offered to show that noncompliance was the result of mistake or inadvertence, or that such failure was occasioned by some act of the respondent which estops him from objecting.

The court cannot, of course, suspend or make exceptions to statutuory conditions; but it is otherwise with the rules of its own creation. In many instances it has relaxed its rules in favor of appellants whose failure to file transcripts and points and authorities was due to circumstances beyond their control. Thus, where the judgment-roll had been lost from the files of the lower court, proceedings upon the motion to dismiss were suspended to afford the appellant time to institute and carry through a proceeding to restore the lost papers.[72] And the

71 Estate of Nelson, 128 Cal. 242, 60 Pac. 772. Where the provisions of section 473 would be available to a party for the correction of a mere clerical error or misprision the same will be disregarded upon appeal. Accordingly, in the above case the court said: "The sufficiency of the notice is not impaired by being directed by Platt & Bayne, attorneys for 'executor,' instead of 'executors.' This was evidently a mere mistake of the scrivener, and could not by any possibility have been misleading. Under section 473 of the Code of Civil Procedure the appellant would have been permitted to amend the notice by correcting the mistake: See Walton v. Marietta Chair Co., 157 U. S. 342, 15 Sup. Ct. Rep. 626; and where the amendment would follow as a matter of course, the mistake is upon an appeal to be disregarded: Code Civ. Proc., § 475. See Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766. The right of appeal is conferred by the constitution, and statutes and rules of procedure for its exercise are to be liberally construed. We are not disposed to dismiss an appeal upon grounds that are purely technical where there has been no violation or disregard of any express rule of procedure."

72 Buckman v. Whitney, 24 Cal. 268.

files of the court show instances of extensions for filing the transcript on concurrent appeals from an order and from the judgment, pending the settlement of a bill of exceptions on the latter appeal, to save the expense of a duplication of the judgment-roll. But to warrant such extension, it should be clearly shown by affidavit or otherwise that the respondent will not be injured by the delay.

Upon the presentation in proper time of a reasonable excuse, no prejudice having resulted to the respondent, the court will relieve the appellant from the usual result of a failure to file the transcript or points and authorities within the time fixed by the rules.[73]

The court will rarely refuse to excuse delay if shown to be the fault of the respondent.[74]

But any matters going to excuse delay should be presented, in the form of affidavits, at the hearing of the motion to dismiss, and it is too late after the motion has been heard and granted.[75]

§ 660. When respondent estopped from asking a dismissal—And herein of waiver.

The doctrines of estoppel and waiver have a limited application in the supreme court. It has been stated that the omission of a jurisdictional prerequisite cannot be waived; and yet, though service of the notice of appeal be jurisdictional, it is seen that the respondent is sometimes said to be estopped by his conduct from denying service. It may be doubted if this is really the operation of the principle of estoppel. Such conduct may be more properly said to furnish conclusive proof of service, which cannot be overcome by other evidence.[76]

73 Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Hubback v. Ross, 79 Cal. 564, 21 Pac. 965; Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Ward v. Healy, 110 Cal. 587, 42 Pac. 1071; Wagner v. Portland (City of) (Or.), 60 Pac. 985; Forleigh v. Kelly, 24 Mont. 369, 62 Pac. 495, 685.

74 See Merchants' Nat. Bank v. McKinney, 1 S. Dak. 78, 45 N. W. 203.

75 Welch v. Kenney, 47 Cal. 414; Jacobs v. Shenon, 4 Idaho, 341, 39 Pac. 193.

76 See chapter 29.

Numerous illustrations of waiver of neglect in filing the transcript and points and authorities could be given.[77]

§ 661. Same subject—Construction of stipulations.

The authorities are sometimes inconsistent on the question whether a jurisdictional fact may be placed beyond the reach of investigation by a stipulation admitting it. At any rate, the terms of a stipulation will not be extended beyond their clear import in order to excuse the appellant from the taking

[77] See Tripp v. Duane, 86 Cal. 149, 24 Pac. 867; Barbour v. Flick, 121 Cal. 425, 53 Pac. 927; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; Boyd v. Slayback, 63 Cal. 493; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Poupion v. Muzio, 68 Cal. 235, 9 Pac. 97; Johnson v. Puritan M. & M. Co., 19 Mont. 30, 47 Pac. 337; Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; Bowman v. Metzger, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090. Where the respondent stipulated in the transcript on appeal that "an undertaking on appeal in due form was filed in said cause within the time allowed by law" (Springer v. Springer, 126 Cal. 452, 58 Pac. 1060), it was held that the appeal should not be dismissed on respondent's motion for insufficiency of the undertaking, upon a showing of ambiguity therein, after the briefs upon the merits of the appeal had been filed, and after the expiration of the time within which another undertaking might have been filed. The facts of the first case are given in the opinion as follows: "The notice does not state upon what ground the motion will be made, but does state that it will be made upon affidavit, a copy of which is served with the notice. The affidavit shows no ground for dismissal, except that of laches or want of prosecution. It and the files and records of this court show that the appeal was taken prior to and the transcript filed in this court on June 24, 1884. It was filed in manuscript, and has never been printed, the appellant having failed to furnish the clerk with funds to pay for the printing. The case was on the calendar for argument several years ago, but was dropped from the calendar. It could not therefore be restored, except upon notice, and it does not appear that any notice has ever been given to restore it to the calendar, and so get it in position to be heard. Both parties have been guilty of gross laches in the matter, and the court does not think that under all the circumstances it ought to allow one of the parties to take such advantage of the laches of the other as to cut her off from a hearing upon the merits, if she desires it, and will now prosecute the matter with due diligence. The present motion to dismiss will be denied." In the second case the appellant was excused for noncompliance with a rule on account of a misunderstanding, no prejudice having resulted.

of any essential step in the proceeding, whether it be jurisdictional or otherwise. Accordingly, it was held that a stipulation by the respondents that the transcript was correct, and that the appeal had been duly perfected, meant nothing more than that the papers in the transcript were correct copies of the record, and that a sufficient undertaking had been properly filed, and did not estop the respondent from moving to dismiss the appeal upon the ground that it was not taken in time.[78] Nor does a stipulation of the respondent extending the time for the justification of the sureties on the undertaking relieve the appellant from the necessity of filing the transcript on appeal within the time limited by the rules.[79] Nor can the filing of an undertaking be waived by a stipulation made after the right of appeal has been lost.[80] And since the time for appeal must be determined by the statutes and not by the stipulation of the parties, it was held that a stipulation that an order was actually entered at a date prior to its actual entry did not estop the appellant from showing the contrary to sustain the appeal, the respondent not having parted with nor obtained any right by reason of the stipulation, and not being injured by the disregard thereof.[81] Nor does a stipulation of the respondent extending the time of appellant in which to file his briefs operate as a waiver of his right to move to dismiss the appeal for want of an undertaking, nor as an estoppel against such motion.[82]

78 Palmdale Irr. Dist. v. Rathke, 91 Cal. 538, 27 Pac. 783.

79 Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160. Where respondents file stipulations postponing the oral arguments, and enlarging the time in which parties should file briefs, reserving therein all objections, etc., that either party may have under the rules of the court, they do not thereby waive any objection to the regularity of the filing and service of notice of appeal, given them by supreme court rule No. 8, requiring objections to the notice of appeal, etc., or to its proper service or proof of service, to be taken at the first term after the transcript is filed: Brooks v. Nevada Nickel Syndicate and National Nickel Co. v. Nevada Nickel Syndicate, 24 Nev. 264, 52 Pac. 575.

80 Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411.

81 In re Estate of Scott, 124 Cal. 671, 57 Pac. 654. No estoppel of respondent's in such case: Estate of Pearson's, 119 Cal. 27, 50 Pac. 929.

82 Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180. Same

But while, as a general rule, jurisdictional defects cannot be waived, there is a distinction between the objection that a paper the filing of which is essential to confer jurisdiction was not filed, and one going to formal defects of such paper. The latter may be waived by stipulation, and in some instances by mere failure to object in proper time. Thus, it was held that, notwithstanding one undertaking upon two distinct appeals was so defective as to justify dismissal of both of them, yet the right to dismiss the appeal from the judgment would be deemed waived where the parties had mutually stipulated for extensions of time for the filing of points and authorities, and no objection was raised to the regularity or sufficiency of the appeal until after the points and authorities were filed, and until it was then too late to take another appeal.[83]

In Matter of Castle Dome Min. Co.[84] it was held that an objection to the jurisdiction for want of service of notice of appeal was not waived under rule 13 by failure to object before the hearing of the appeal, but might be urged at the hearing as a ground for dismissing the same. But a more liberal rule was adopted subsequently to this decision with reference to proof of service of the notice of appeal, allowing it to be produced in the supreme court.[85] It would probably be now held that the appellant was entitled to notice of the objection to enable him to procure and produce at the hearing, or in response to a motion to dismiss, his proof of service.

§ 662. Hearing and disposal of motion—Best evidence required—Grounds must be specified.

The court may be said to have unlimited discretion as to what it will receive and consider on the motion to dismiss. But where the rules have prescribed certain evidence or

principle in San Bernardino (County of) v. Riverside (County of), 135 Cal. 618, 67 Pac. 1047.

[83] Gardner v. California Guarantee Invest. Co., 129 Cal. 528, 62 Pac. 110. In this case it was pointed out that such waiver would not apply to a distinct appeal from an order made after judgment, the time of appeal from which had lapsed before any stipulations were made.

[84] 79 Cal. 246, 21 Pac. 746.

[85] See ante, § 648.

a certain record upon which the motion shall be heard, the party moving to dismiss will not be permitted to substitute other or inferior evidence or a different record than that so designated.[86] So strictly has this rule been enforced recently by the California supreme court that in the absence of the transcript upon appeal disclosing who are the attorneys of record, an appeal will not be dismissed upon a mere stipulation of attorneys, without a certificate of the clerk, under seal of the court, setting forth the matters required by rule 6 of the court, and also the date of the entry of the order or judgment appealed from.[87] And unless the point be one vital to the jurisdiction, it will not be regarded or passed upon unless specified in a notice given as required by the rules.[88]

86 Camenzkind v. Kampfen, 130 Cal. 596, 62 Pac. 1073.

87 Camenzkind v. Kampfen, 130 Cal. 596, 62 Pac. 1073. The opinion in this case contains facts and information of value to the profession and reads, in part, as follows: "A motion has been made to dismiss the appeal from the judgment in the above-entitled action, based upon a stipulation signed by certain attorneys of this court, representing themselves as attorneys respectively for the appellant and respondent. No transcript on appeal has been filed, nor has the moving party presented any certificate from the clerk of the superior court from which it can be determined whether the appeal has been taken, or who are the attorneys therein for the respective parties. Subdivision 2 of rule 6 of this court provides that, on a motion to dismiss an appeal on any other ground than the failure to file the transcript within the prescribed time, the moving papers should consist of the certificate of the clerk below setting forth certain matters mentioned in the preceding subdivision of the rule, among which are 'the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears.' While we have no reason to question the authority of the attorneys who have signed the above-named stipulation, we are unwilling to establish a precedent by which an order for the dismissal of an appeal may be granted upon the application persons not authorized to represent the parties to the appeal. In analogy to the practice embodied in the above rule, it must be held that on a motion to dismiss an appeal upon a stipulation of the parties thereto, when no transcript of the record has been filed herein, there must be presented, in addition to the stipulation, a certificate of the clerk below, under seal of the court, setting forth the matters aforesaid, and also the date of the entry of the order or judgment appealed from."

88 Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176, holding that an

§ 663. Hearing and disposal of motion—Appearance need not be limited.

There is no necessity for limiting appearance at the hearing of the motion. The fact that the respondent appears generally instead of appearing specially has no effect to confer general jurisdiction on the court, if it be not asked to do more than dismiss the appeal.[89]

§ 664. Hearing and disposal of motion—When and to what extent record consulted.

There cannot be said to be any settled rule prohibiting an examination of the record in order to pass upon the grounds assigned for a dismissal. If they can be passed upon by a mere cursory glance at essential parts of the transcript, such examination will usually be made, upon the principle that it would be useless to unnecessarily prolong a litigation which can have but one result, easily made manifest.

The motion can only bring up two general questins: (1) Whether an appeal lies from the order or judgment, and (2) whether the appellant has prosecuted the appeal as required by law or rules of the court.[90] Some of the available special

appeal cannot be dismissed for want of a sufficient undertaking where it is not made a ground of the motion of a respondent who may have waived the giving of the undertaking; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, holding that the failure to give an undertaking upon an appeal from an order will not be considered upon a motion to dismiss the appeal, which does not assign such failure as one of the grounds of the motion; Payne v. Spokane St. Ry. Co., 15 Wash. 522, 46 Pac. 1054, holding that an appeal will not be dismissed, on the ground that the statement of facts was not settled in conformity with law and the appeal not legally taken, where no specific errors are pointed out. When a motion to dismiss an appeal from a judgment is amended so as to include an appeal from an order denying a new trial, the motion to dismiss the appeal from the order cannot be regarded as having been made until notice is given of the amendment to the motion, and if the transcript is filed on that day, and the respondent does not show that his notice was given prior to its filing, it is a sufficient answer to the latter motion: Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006.

[89] Hauser v. Nolting, 11 S. Dak. 483, 78 N. W. 955.

[90] See In re Davis' Estate (Mont.), 70 Pac. 721.

grounds under each of these heads are apparent upon cursory inspection, while others are not. When thus easily made manifest, they will be considered and disposed of at the hearing of the motion.[91] When they are not, the respondent does not, as a rule, lose the benefit of them if properly specified. The court will either order the motion submitted with the appeal or deny it, with the reservation of the points to be passed upon in connection with the merits. It is a well-established rule, however, that the motion will be formally or tentatively denied if a consideration of the grounds urged involves an investigation of the whole or any considerable portion of the record relied upon to show a meritorious appeal.[92] The objection that a party

91 See Estate of Crooks, 125 Cal. 459, 58 Pac. 89, holding that an appeal by the mortgagee from the decree of distribution, the record upon which merely shows an offer of the mortgage in evidence, unaccompanied by a pleading or statement of facts, or by any showing that the mortgage debt was not paid, and does not show that the mortgagee is an aggrieved party, must be dismissed. In Miller v. Thomas, 78 Cal. 309, 21 Pac. 11 the transcript on appeal did not contain the judgment-roll, but only a part of the findings relating to the matter of expenditures and costs, and a portion of the final judgment relating to the allowance of costs, which portion was appealed from, and there was nothing to show who were all the parties to the record, or whether all entitled to service had been served with the notice of appeal, and the record was in such a condition that it was considered useless to attempt an examination of the case upon its merits, and impossible to determine whether the error assigned existed or not, and the appeal was dismissed. Where it affirmatively appeared that evidence was admitted on the hearing of the order appealed from, which was not incorporated in a bill of exceptions, settled by the court or judge, the appeal was dismissed: Anderson v. Hultman, 12 S. Dak. 105, 80 N. W. 165. This decision is not authoritative generally being influenced by the system of appellate procedure peculiar to South Dakota.

92 Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Jarman v. Rea, 129 Cal. 157, 61 Pac. 790, holding that the objection that the transcript does not contain any specifications of the errors of law, or the particulars in which the evidence is insufficient, is not ground for a motion to dismiss the appeal, and cannot be considered upon such a motion; Estate of Kasson, 135 Cal. 1, 66 Pac. 871; Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120; Howell v. Howell, 101 Cal. 115, 35 Pac. 443; Langan v. Langan, 86 Cal. 132, 24 Pac. 852; Corder v. Speake, 37 Or. 105, 51 Pac. 647; Watson v. Sawyer, 12 Wash. 35, 40 Pac. 413; Wall v. Mines, 128 Cal. 136, 60 Pac. 602, holding that

other than the respondent entitled to service of the notice of appeal was not served is usually one of those questions which involve an examination of the entire record, and will not be gone into at the hearing of the motion in the first instance, but will be continued until the hearing of the appeal.[93] And, as

the question as to what use can be made, upon an appeal from the judgment, taken more than sixty days after its entry, of a statement settled to be used upon a motion for a new trial, is not involved in a motion to dismiss the appeal from the judgment, where it does not appear affirmatively that it cannot be used for any purpose upon such appeal: Randall v. Duff, 105 Cal. 271, 38 Pac. 739, same ruling where motion based upon absence from record of a bill of exceptions.

[93] Hibernia Sav. etc. Soc. v. Behnke, 118 Cal. 498, 50 Pac. 666; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; Estate of Bullard, 114 Cal. 462, 46 Pac. 297; Latham v. Los Angeles (City of), 83 Cal. 564, 23 Pac. 1116; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398. The rule stated in the text was directly applied in the first case above; and the reasons for it concisely stated in these words: "The respondent has moved to dismiss the appeal for failure to serve the notice upon one claimed by it to be an adverse party. The motion was not made until after the appellant had filed his points and authorities upon the appeal, and the respondent has included the points in support of the motion with its points and authorities upon the appeal. The determination of the motion involves an examination of the entire record, and incidentally of the merits of the appeal, and ought not to be determined in advance of the hearing of the cause. The motion is therefore, continued until the hearing upon the appeal." In Kenney v. Parks, supra, the court said: "The dismissal is also asked upon the ground that the notice of appeal should have been served upon the defaulting defendants. It was not necessary to serve these defendants with the notice of appeal unless they are 'adverse parties'; and whether they are adverse parties depends upon whether a reversal of the judgment will injuriously affect their interest in the matter determined by the judgment. This fact must be determined from the record on the appeal, and cannot be shown by affidavits outside of this record: Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Estate of Ryer, 110 Cal. 560, 42 Pac. 1082. There is no joint relation alleged between the defendants herein, and the judgment against each is several and independent. The judgment in favor of the plaintiff quieting her title, and giving her the right of possession to the lands described therein as against the defaulting defendants, could not be affected by its reversal at the instance of the defendants who had appealed: Randall v. Hunter, 69 Cal. 80, 10 Pac. 130. It cannot be said that a reversal of that portion of the judgment which reforms the deed to the plaintiff would injuriously affect the interests of the nonappealing defendants. The motion is

a rule, defects alleged to exist in the statement of a case embodied in a transcript on an appeal from an order denying a new trial will be considered only upon the hearing of the appeal upon its merits, and not entertained as a ground for a motion to dismiss the appeal.[94] And the same is true as to omissions and irregularities pertaining to the settlement of statements and bills of exceptions.[95]

It seems that the question of whether an order is appealable is one which the court must determine by examination of the record and will not determine at the hearing of the motion to dismiss. In Centerville etc. Co. v. Bachtold[96] the court said: "A motion to dismiss an appeal upon the ground that the order is not appealable assumes that the appeal has been perfected, and that there is before this court a properly authenticated record of the action of the superior court. Whether the order appealed from is an appealable order is a question of law that can be determined only by a judicial comparison of the record containing the order, with the statute prescribing the orders from which appeals may be taken, and as this court can-

denied." And in Estate of Bullard, supra, the court said: "It is only the record upon the appeal, however, which can be examined for the purpose of ascertaining who are adverse parties to be served with the notice of appeal: Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; 'and the record which is to be considered for that purpose is the record of the proceeding in which the appeal is taken.' In re Ryer, 110 Cal. 556, 42 Pac. 1082."

94 Richardson v. Eureka (City of), 92 Cal. 64, 28 Pac. 102. Same principle in Paige v. Roeding, 89 Cal. 69, 26 Pac. 787; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

95 Estate of Scott, 124 Cal. 671, 57 Pac. 654; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Sutter County v. Tisdale, 128 Cal. 154, 60 Pac. 757; Richardson v. Eureka (City of), 92 Cal. 64, 28 Pac. 102; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621; In re Reilly's Estate, 26 Mont. 358, 67 Pac. 1121. Appears to have been otherwise in Nosler v. Coos Bay R. & E. R. & Nav. Co., 40 Or. 305, 63 Pac. 1050, 64 Pac. 855; First Nat. Bank v. Andrews, 11 Wash. 409, 39 Pac. 672.

96 109 Cal. 111, 114, 41 Pac. 813. See, also, Creek v. Bozeman Waterworks Co., 22 Mont. 327, 56 Pac. 362.

not exercise its appellate jurisdiction of a cause until after the appeal has been perfected, we are limited, upon a motion to dismiss an appeal upon the ground that it has not been perfected, to a consideration of the steps taken for perfecting the appeal, and cannot look into the record either for the purpose of determining whether the order appealed from is appealable, or whether the appeal is without merit or whether the court below has committed error in its rulings. On the other hand, whether an appeal has been perfected is a question of fact depending upon proceedings subsequent to the entry of the order in the court below. When a motion to dismiss an appeal is made upon this ground, the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking any appeal. The two motions proceed upon different records, the one upon a record of the action of the court below culminating in and including the order appealed from, while the other is to be determined upon a record of proceedings taken by the appellant subsequent to and independent of the order appealed from."

Omissions from the record on appeal, whose only effect is to diminish or limit the scope of review, cannot be considered on motion to dismiss the appeal.[97]

§ 665. Hearing and disposal of motion—How motion based upon defective record may be met.

Appellate courts are liberal in allowing omissions in the record to be supplied in response to motions to dismiss. The rules must be consulted and substantially complied with. This is no hardship, however, as their provisions are ample for the necessities of every case.[98] And whatever can be done in this

97 Taney v. Vallenwerder, 24 Mont. 367, 62 Pac. 413. See, also, Logan v. Rickardo, 14 Mont. 334, 36 Pac. 318, holding that failure of appellant to except to findings, was no ground for dismissal: Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376, to same effect.

98 Dolph v. Nickum, 2 Or. 202; Barbee v. Goodale, 28 Or. 465, 38 Pac. 67, 43 Pac. 378; holding that the return of service of notice of appeal may be amended so as to conform to the facts. Clerk's

way to meet the motion should be done prior to the submission—at any rate before the disposal of the motion to dismiss; otherwise it will be too late.[99]

In the California supreme court the objection that some portions of the judgment-roll have been omitted from the transcript is not ground for the dismissal of an appeal, in the first instance; but the remedy of the respondent is to notify appellant of his exceptions to the transcript, at least five days before the hearing of the appeal, under rule 15 of the court. The appellant will then have an opportunity to supply the papers, and, failing to do so, must take the risk of having his appeal dismissed.[100] It is otherwise, as shown in a preceding section, where the omission is so important as to leave nothing to be considered at the hearing of the appeal, and no attempt is made to meet the objection by suggesting a diminution and producing certified copies of the missing papers at the hearing of the motion. If the omission be of only a part of the record, which it is evidently within the power of the appellant to supply, he may be granted until the hearing of the appeal, if so long time be required, for that purpose.[101]

Undoubtedly, the better practice, in all cases of vitally defective transcripts, would be to move to dismiss in conjunction with the proceeding authorized by rule 15.

certificates to transcripts amended in Nolan v. Montana Central Ry. Co., 24 Mont. 327, 61 Pac. 880. Mistake of inserting wrong paper in transcript corrected in Byers v. Ferguson, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5.

99 Baker v. Butte City Water Co., 24 Mont. 113, 60 Pac. 817. In this case the court said: "Counsel insists that, in the event the court does not agree with him as to the sufficiency of the undertaking, he may still be permitted to file another, and thus reinstate the appeal. The court has no authority to permit this after the motion to dismiss has been submitted: Code Civ. Proc., sec. 1740. The statute is clear and explicit, and leaves no room for discretion."

100 Hellings v. Duval, 119 Cal. 199, 51 Pac. 335. To same effect, Paige v. Roeding, 89 Cal. 69, 26 Pac. 787.

101 Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006. See Richardson v. Eureka (City of), 92 Cal. 64, 28 Pac. 102, where judgment-roll was supplied after motion noticed for hearing; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103

In case of essential parts of the record on appeal being lost from the files in the lower court, the proceeding to supply copies should be there taken, and copies thereof produced in the appellate court. And where a motion is made to dismiss an appeal upon the ground that the transcript fails to show that the notice of appeal was served upon the respondent, the appellant in reply thereto may file as a portion of the record a certified copy of proceedings in the superior court, showing that the original notice of appeal has been lost, and that it has been established to the satisfaction of that court that the notice of appeal set forth in the printed transcript was duly served, and a written admission of the service made by the attorney for the respondent indorsed upon the same, and that said notice of appeal was filed in the office of the clerk of that court; and that the court thereupon made an order directing that a copy of the notice of appeal, together with the affidavit showing its original filing and service, be filed nunc pro tunc; and the substituted papers made upon such order of the court are entitled to the same weight as the originals.[102] Upon the same principle, it was held that if the order appealed from was actually made, but was not entered upon the record, the supreme court might grant leave to have an order entered nunc pro tunc, certified up, and, if it appeared to be the proper order, it was sufficient.[103] But is there an order of which the supreme court can take cognizance in such case?[104]

Usually, the appellant is sufficiently informed as to defects by the notice of motion, or of exceptions, and will be required to supply the defects at the hearing of the motion or exceptions, or to present a good reason for a failure to do so.[105]

102 Knowlton v. McKenzie, 110 Cal. 183, 42 Pac. 580.

103 Lee Chuck v. Quan Wo Chang Co., 81 Cal. 222, 15 Am. St. Rep. 50 and note, 22 Pac. 594.

104 See Cal. Code Civ. Proc., § 1003, defining an order. The question in the text is not designed to question the particular decision cited in the next preceding note, for in that case, the existence of the order was not controverted.

105 Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214; Hellings v. Duval, 119 Cal. 199, 51 Pac. 335; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103; Shay v. Chicago Clock Co., 111

This is the proper practice where the objection is aimed at defects in proof of service of the notice of appeal, as where it is directed at parts belonging to the transcript proper.[106] The same objection could not be thus obviated in Washington, where a failure to file proof of service in the lower court within five days defeats the jurisdiction.[107]

The rule of the California supreme court prescribes what the clerk's certificate to be used by respondent on motion to dismiss for failure to file the transcript shall contain. A certificate defective in the matters so specified will be held insufficient; for instance, where it failed to state, and it did not otherwise appear, who were the attorneys for the respective parties, or who was the attorney by whom the notice of appeal was given,[108] and where it failed to show service of the notice of appeal.[109]

When the motion to dismiss is based upon a failure to serve any paper required by statute or court rule to be served, and an attempt is made to meet it by presenting to the court proof of service, full legal service must be shown.[110]

Cal. 549, 44 Pac. 237. The indorsement of a filing, mark by a judge or clerk of court is not an essential part of the filing of papers, and, where papers for an appeal were in fact properly filed, the court, on a motion to dismiss, may permit such indorsement to be supplied, or an incorrect indorsement to be amended, in accordance with the facts: Starkweather v. Bell, 12 S. Dak. 146, 80 N. W. 183.

106 Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726; Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757; Estate of Stratton, 112 Cal. 513, 44 Pac. 1028. As to effect of record recitals as to service of notice, see Billinghurst v. Spink Co., 5 S. Dak. 84, 58 N. W. 272.

107 See Puckett v. Moody, 17 Wash. 609, 50 Pac. 494; Wash. Laws, 1893, p. 121, § 4.

108 Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568.

109 Carpentier v. Bartlett, 62 Cal. 561.

110 See Linforth v. White, 129 Cal. 188, 61 Pac. 910; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Moffatt v. McGrath, 25 Or. 478, 36 Pac. 578. In the last case cited above, an important question touching the question of proof of service of notices upon parties individually was decided. The court said: "By section 527 of the code, proof of the service of a notice of appeal shall be the same as the proof of service of a summons, and therefore it may be by the written admission of the party to be served (section 61); but an indorsement upon a process of the written acknowledgment of ser-

§ 666. Hearing and disposal of motion—What considered outside transcript—Form of presenting same.

Some of the matters properly pertaining to this head were incidentally but necessarily discussed in the two preceding sections. It may be stated as a well-settled rule that, while the body of the transcript may be corrected by supplying defects and omissions, it cannot be contradicted.[111] But this rule does not apply to the clerk's certificate, which, it seems, may be contradicted by affidavits;[112] but such contradictions are limited

vice purporting to be signed by a party is not sufficient evidence of such admission unless it is accompanied with proof of the genuineness of the signature of the party, for the court cannot take judicial knowledge of the signature of a party who has not appeared in the cause, and therefore, without such proof, cannot know whether the signature is that of the party it purports to be or not. 'It is well settled,' says Mr. Justice Field, 'that courts will take judicial notice of the signatures of their officers, as such; but there is no such rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendant, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court cannot notice them'; Alderson v. Bell, 9 Cal. 321. To the same effect are Johnson v. Delbridge, 35 Mich. 436; Litchfield v. Burwell, 5 How. Pr. 346; Bozeman v. Brower, 6 How. (Miss.) 43; Gatewood v. Rucker, 1 T. B. Mon. 21; Ex parte Gibson, 10 Ark. 572; Norwood & Chambers v. Riddle, 9 Port. (Ala.) 425. It follows that the writing purporting to be an admission of service by the defendant, without proof of its authenticity, did not authorize the court to assume jurisdiction.''

111 People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773. See, also, Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. But in Smith v. Hawley, 11 S. Dak. 399, 78 N. W. 355, it was held that the fact that an appeal was taken before the judgment or order appealed from was entered, may be shown, on a motion to dismiss the appeal, by affidavit, or by the certificate of the clerk of the court, though outside of the record.

112 Washoe Copper Co. v. Hickey, 23 Mont. 319, 58 Pac. 866. See ante, § 661, as to stipulations. A certificate attached to the transcript in which the clerk certifies that ''a good and sufficient undertaking on appeal in due form was properly filed herein,'' conforms with the requirements of the code, and is prima facie sufficient, and it is incumbent upon the respondents to show any incorrectness in the certificate: Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

to the recitals as to the undertaking on appeal.[113] Nor does the rule apply so as to prevent it being shown that the appeal was taken, or is being prosecuted without authority.[114]

§ 667. Hearing and disposal of motion—Use of affidavits.

In passing upon motions to dismiss appeals, questions of fact must sometimes be passed upon.

Where the record does not affirmatively disclose a lapse in the appellate proceeding, the presumptions are in favor of regularity and sufficiency, and the burden is upon the moving party to show the contrary. Accordingly, it was held that a motion to dismiss an appeal on the ground that the undertaking on appeal was filed before the notice of appeal was served should not be granted where the time of the service of the notice did not appear from the record, and upon the question of its service before or after the filing of the undertaking, the affidavits of various parties who were acquainted with the facts squarely contradicted each other.[115] But where, upon a motion to dismiss an appeal for failure to serve the notice of appeal upon all of the adverse parties, the appellants submitted an affidavit, stating in positive terms service of the notice upon the attorney by mail, and the existence of the conditions upon which such service was permissible, and also stating that, after the service, respondents' attorney admitted receipt of the notice through the mail, it was held that such statements should prevail over any mere inference to the contrary, from facts set forth in an affidavit of respondents' attorney, including a state-

113 Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568, holding that a motion to dismiss an appeal for failure to file the transcript within time must be heard upon the certificate of the clerk, and an affidavit for the respondent cannot be considered for the purpose of determining the character of the records kept by the clerk, or from what order the appeal was taken; Ward v. Spingfield Fire and Marine Ins. Co., 12 Wash. 631, 42 Pac. 119, holding that extrinsic evidence cannot be received by the supreme court to show that the notice of appeal, which appears from the record to have been served too late, was in fact served within the statutory time.

114 Dalbkermeyer v. Scholtes, 3 S. Dak. 124, 52 N. W. 261.

115 Coonan v. Lowenthal, 122 Cal. 72, 54 Pac. 388.

ment of mere want of recollection by him of the admission that the notice was received.[116]

In order to use affidavits at the hearing of the motion they should be served with the notice; and where an affidavit in support of the motion to dismiss was filed with the clerk of the supreme court, but it did not appear that the affidavit was served on the appellant or his attorney, the affidavit was refused consideration and stricken out.[117]

The burden of proof shifts to the appellant when the record which would regularly show a certain fact, or the taking of a certain step within a given time omits any showing whatever on the subject; and an appeal was dismissed for a failure to file a transcript, although there were affidavits of a verbal stipulation extending time, there being also counter-affidavits by the respondent.[118] It may be considered fully settled that in the face of a written stipulation affidavits by which it is sought to contradict its recitals will not be admitted.[119] This is an application of the rule that the transcript presented to the appellate court cannot be corrected in that tribunal by affidavits or other extrinsic evidence. In Ward v. Insurance Co.[120] an attempt was made by the appellant to avoid a dismissal by a showing on affidavits that the true date of filing the notice of appeal was other than that shown in the transcript from which it appeared that it was filed too late. But the court said: "By the section of the statute above mentioned, the notice of appeal and the proof of service thereof become a part of the record, for the reason that the clerk is required to enter the same in the

116 Brandenstein v. Johnson, 134 Cal. 102, 66 Pac. 86. See, also, Woodbury v. Nevada Southern Ry. Co., 115 Cal. 85, 46 Pac. 862.

117 Threlkeld v. O'Neal, 26 Mont. 209, 66 Pac. 940.

118 Wood v. Forbes, 62 Cal. 37.

119 Forni v. Yoell, 99 Cal. 174, 33 Pac. 887; Wadsworth v. Wadsworth, 81 Cal. 183, 15 Am. St. Rep. 38, 22 Pac. 648, Carey v. Brown, 58 Cal. 180; Bonds v. Hickman, 29 Cal. 460; Matter etc. Gold St. v. Newton, 2 Dak. 40, 3 N. W. 311; Oliver v. Howey, 5 Or. 362; Ward v. Insurance Co., 12 Wash. 632, 42 Pac. 119.

120 12 Wash. 631, 42 Pac. 119. See, also, In re Fifteenth Avenue Extension, 54 Cal. 179; Boyd v. Burrell, 60 Cal. 280; Boston v. Haynes, 31 Cal. 107; Smith v. Brannan, 13 Cal. 107; Satterlee v. Bliss, 29 Cal. 521; McDonald v. Bowman, 40 Neb. 269, 58 N. W. 704.

journal of the court. It is alleged in this motion, as it was in the previous one, that, as matter of fact, the notice of appeal was served on December 1, 1894, and not on November 23, 1894, as appears by the record. And in order to establish the truth of this allegation the learned counsel for appellant have tendered several affidavits which they ask this court to consider. This we cannot do."

§ 668. Effect of dismissal.

There were several cases decided shortly after the adoption of the California codes, in which it was held that a motion to dismiss for failure to comply with statutory conditions would not be entertained.[121] The theory upon which these decisions were based was that a dismissal had the effect of an affirmance under the provisions of the code, and [122] that such an abortive attempt to appeal might be ignored. The purpose was to avoid prejudicing the appellant with respect to another appeal which he might still take. But the suggestion with which the code provision closes was seen to furnish a solution of that difficulty, and in all recent and comparatively recent cases the order of dismissal is made without prejudice to another appeal if the appellant so desires.[123] And the appellate court has power

121 See Dinan v. Stewart, 48 Cal. 567; Harlan v. Pratt, 50 Cal. 94; Reed v. Kimball, 52 Cal. 325.

122 Cal. Code Civ. Proc., § 955.

123 See Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998, where appeal dismissed without prejudice on account of insufficiency of undertaking; Fisher v. Tomlinson (Or.), 60 Pac. 390, holding that where a party files an imperfect notice of appeal, he can abandon the attempt to appeal, serve another notice, and perfect his appeal through the latter, instead of the former notice; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571, holding that a party, by giving a premature notice of appeal, and filing an appeal bond, and abandoning it, is not deprived of the right to appeal on a second notice, seasonably given, though there is no formal dismissal of the first appeal; Brunell v. Logan, 16 Mont. 307, 40 Pac. 597, holding that where there is no judgment in the record, and it does not appear that there was a judgment which could be supplied under suggestion of diminution, an appeal from the judgment should be dismissed without prejudice; Osborn v. Logus, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; holding that where an appeal was not fully perfected, and was dismissed therefor, another appeal might be taken; Estate of Rose, 80 Cal. 166, 22 Pac. 86.

to modify an order of dismissal so as to make it read "without prejudice," and thus permit the prosecution of another appeal notwithstanding that the remittitur has issued before the modification is made.[124] But where an appeal from an order has been taken to the superior court, and that court has refused to dismiss it without prejudice, its determination is as effectual for the purposes of the case as if determined for all purposes; and the question whether the order appealed from shall be ultimately held appealable or not, is one that properly arises upon determination of the appeal pending in the supreme court, and cannot be considered upon an application to prohibit the superior court from proceeding to enforce its order, upon the ground that the order is not appealable.[125]

Dismissal of appeal from judgment because of failure to file transcript within the time prescribed by rule 2 of the supreme court is, in effect, an affirmance of the judgment, if the order of dismissal does not expressly provide that it is made without prejudice to the right of the appellant to take another appeal; and a second appeal from the same judgment will be dismissed.[126]

Some of the earlier decisions touching the finality of dismissals are to be accounted for by reference to statutory provisions no longer in force. The Practice Act of 1851, contained no provision as to the effect of a dismissal. A rule of court, however, provided that, if during the first week of the term the appellant failed to file the transcript the appeal could be dismissed without notice; that where an appeal was thus dismissed it could be reinstated during the same term upon notice and for good cause shown, but that "unless so restored the dismissal should be final, and a bar to any other appeal in the same cause." In 1875, by amendment of the rules, the entire provision for restoration of dismissed appeals was omitted.

124 Romine v. Cralle, 80 Cal. 626, 22 Pac. 296. That court has full power over the subject and will change, set aside and modify its orders to meet the just requirements of each case, see Anthony v. Grand, 99 Cal. 602, 34 Pac. 325.

125 Ruggles v. Superior Court, 163 Cal. 125, 37 Pac. 211.

126 Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170. As to finality of judgment upon dismissal in Arizona, see Johns v. Phoenix Nat. Bank (Ariz.), 56 Pac. 725.

While the provision was in force it was so construed as to render a dismissal for failure to file the transcript in time equivalent to an affirmance, and hence a bar to a subsequent appeal.[127] The rules did not, however, contain any provision giving the effect of an affirmance to a dismissal for failure to file an undertaking or to file and serve the notice of appeal; consequently it was held that a dismissal for these causes did not so operate and was not a bar to a subsequent appeal.[128]

Under the provisions of the code and of all similar statutes a dismissal, however accomplished, unless qualified, is equivalent to an affirmance of the judgment below, such is the general tenor and effect of the authorities.[129] The code provision under which that effect may be avoided reads as follows: "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."[130] The case of Spinetti v. Brignardello[131] has been sometimes referred to as authority for the proposition that a dismissal for failure to file the transcript within the required time would not be made "without prejudice." But the decision was upon the dismissal of a second appeal after a dismissal of a prior appeal wherein the appellant neglected to preserve his right to a second appeal by asking that the dismissal be "without prejudice to another appeal." The court called attention to the fact that the order dismissing the first appeal did not contain this clause. The section above quoted contains nothing to indicate that there

127 See Korth v. Light, 15 Cal. 326; Roland v. Kreyenhagen, 24 Cal. 57, 58.

128 See Martinez v. Gallardo, 5 Cal. 155; Bernheimer v. Baldwin, 42 Cal. 32.

129 Spinetti v. Brignardello, 54 Cal. 521; Osborn v. Hendrickson, 6 Cal. 175; Chase v. Berand, 29 Cal. 138; State v. Bieseman, 12 Mont. 18, 29 Pac. 534; Casanova v. Kreusch, 21 W. Va. 727; Perry v. Horn, 21 W. Va. 736, where the court said: "The general spirit which has pervaded the law of this country has been in opposition to the granting of a second appeal or writ of error where the first has been dismissed for want of prosecution," citing Karth v. Light, 15 Cal. 327.

130 Cal. Code Civ. Proc., § 755.

131 54 Cal. 521.

is to be any distinction in this connection between the various grounds of dismissal.

§ 669. Renewal of motion.

The court will sometimes grant leave to renew a motion to dismiss an appeal, and though a second motion to dismiss an appeal on grounds existing at the time of the first motion should ordinarily not be heard, it will be, where the first motion was denied, with leave to move anew, on grounds not stated in the first motion, without restriction as to presentation of matters occurring after the filing of the first motion.[132] But when a motion to dismiss an appeal has been denied, a renewal of the motion upon the same grounds, upon the hearing of the appeal upon its merits, without leave granted in the former order, has nothing to commend it to the discretion of the court, and such renewed motion will be denied.[133]

132 King v. Pony Gold-Min. Co., 24 Mont. 470, 62 Pac. 783.

133 Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116. See, also, Dorn v. Baker, 92 Cal. 194, 28 Pac. 225.

CHAPTER 40.

SCOPE OF REVIEW AND DECISION ON APPEAL.

§ 670. Limitation of discussion and illustration.
§ 671. Review limited by the record.
§ 672. Limiting review by stipulation or waiver.
§ 673. Court may consider matters not alluded to in argument.
§ 674. Decision of points not necessary to be passed upon.
§ 675. Review limited by the record—Whether points argued in lower court immaterial.
§ 676. Limitation by consent.
§ 677. Limitation by estoppel equivalent to consent.
§ 678. Limitation by rule against decision of facts.
§ 679. When rule not applicable—Review of evidence when mistake, misapprehension, passion, etc., of jury.
§ 680. Modification of general rule in certain states.
§ 681. When no substantial conflict, sufficiency, or insufficiency of evidence is a proper question for review.
§ 682. No review of facts, where decision is an inference from circumstances.
§ 683. Limitation by concession to discretion of trial court.
§ 684. Limitation resting upon presumptions in favor of judgment or order appealed from.
§ 685. Further as to presumption against error.
§ 686. Further as to presumptions on appeal and their rebuttal.
§ 687. Presumptions in cases of statements and bills of exceptions.
§ 688. Limitation by rule that matter complained of must affect a party entitled to take an appeal and actually appealing.
§ 689. Limitation by rule that judgment or order not disturbed by immaterial or nonprejudicial matter.
§ 690. Scope of investigation in cases of judgment by default.
§ 691. Limitation by "law of the case."
§ 692. Limitation resulting from doctrine of stare decisis.
§ 693. No limitation by reasoning of lower court.
§ 694. Scope of inquiry and decision cannot be enlarged by statute.
§ 695. Abortive legislative attempts to control herein.

§ 670. Limitations of discussion and illustration.

Notwithstanding the wide field of jurisdiction exercised by appellate courts, there are numerous and well-settled limitations to it. Of the many cases that have been decided in any state, few will be found in which the boundaries of permissible review have not been directly pointed out or intimated.

The most important limitation, to review, is jurisdictional, already generally discussed.[1] But there are others, among which are defectiveness of records, omissions to assign error, and numerous presumptions arising upon such defects and omissions.

It is, of course, impossible to cite all, or even a majority of the decisions. Care has been taken, however, to select and use the best, for purposes of exposition and illustration.

§ 671. Review limited by the record.

The most general proposition that can be stated, under the present head, is that, no matter what, or how many, points are made, either in oral argument, or in the briefs, unless they have been preserved of record in the case in some appropriate form, and with requisite fullness, they cannot be considered. This has been expressed often, and in a great variety of forms. But the essential thing meant is, that a point cannot be made, or an exception taken in the supreme court, which was not so presented in the lower court as to call for a decision thereon, and was expressly, or impliedly, passed upon in the court be-

[1] Ante, chapter 23. Objection that complaint wholly fails to state a cause of action may be regarded as jurisdictional, and is not waived by failure to object in lower court: Sears v. Williams, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; First Nat. Bank v. Carter, 10 Wash. 11, 38 Pac. 877; Curtis v. Bachman, 84 Cal. 216, 24 Pac. 379; Holly v. Heiskell, 112 Cal. 174, 44 Pac. 466; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735, where contract specifically enforced by lower court appeared by the record to be illegal. But see, King v. Meyer, 35 Cal. 646. Objection successfully raised to complaint in appellate court in Tracy v. Harmon, 17 Mont. 465, 43 Pac. 500; De Baca v. Wilcox (N. Mex.), 68 Pac. 922; Wyatt v. Henderson, 31 Or. 48, 48 Pac. 790; Thompson v. Roberts (S. Dak.), 92 N. W. 1079; Murry v. Burns, 6 Dak. 170; Nelson v. Ladd, 4 S. Dak. 1, 54 N. W. 809.

low.[2] Parties are required to take all proper steps for the protection of their rights in the lower court. Thus, it was held, that a judgment which was right upon the pleadings would not be reversed merely to allow the plaintiff to apply for leave to amend his complaint.[3]

Of the general rule above stated, a whole volume of illustrations could be given. No question can be raised in the supreme court for the first time as to the sufficiency of the pleadings, except where a pleading, without reference to mere de-

2 See Hodgdon v. Griffin, 56 Cal. 610; Brichman v. Ross, 67 Cal. 601, 8 Pac. 316; Campbell v. West, 93 Cal. 653, 29 Pac. 219; Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 Pac. 231; Schmidt v. Breig, 100 Cal. 672, 35 Pac. 623; Estate of Robinson, 106 Cal. 493, 39 Pac. 862; Ah Tong v. Earl Fruit Co., 112 Cal. 679, 45 Pac. 7; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Stockton Combined, etc. Works v. Glen Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; Liebrandt v. Serg, 133 Cal. 571, 65 Pac. 1098; Krasky v. Wallpert, 134 Cal. 338, 66 Pac. 309; Providence Gold Min. Co. v. Marks (Ariz.), 60 Pac. 938; Daggs v. Balton (Ariz.), 57 Pac. 611; Burke v. Interstate Sav. etc. Assn., 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; Maxwell v. Tufts, 8 N. Mex. 396, 45 Pac. 979; Beak v. Thompson, 22 Nev. 109, 36 Pac. 562; Loverine-Browne Co. v. Bank, 7 N. Dak. 569, 75 N. W. 923; Henry v. Maher, 6 N. Dak. 413, 71 N. W. 127; James v. Wilson, 8 N. Dak. 186, 77 N. W. 603; Plano Mfg. Co. v. Jones, 8 N. Dak. 315, 79 N. W. 338; Van Bibber v. Fields, 25 Or. 527, 36 Pac. 526; Oregon City (City of) v. Clackamas County, 32 Or. 491, 52 Pac. 310; Tatum v. Massie, 29 Or. 140, 44 Pac. 494; Allen v. City of Portland, 35 Or. 420, 58 Pac. 509; Trotter v. Stayton, 41 Or. 117, 68 Pac. 3; United States Mortgage Co. v. Marquam, 41 Or. 391, 69 Pac. 37, 41; Salem Traction Co. v. Anson, 41 Or. 562, 69 Pac. 675; Lindsay v. Pettigrew, 6 S. Dak. 130, 60 N. W. 744; Van Dusen v. Arnold, 5 S. Dak. 588, 59 N. W. 961; Loomis v. Lecocq, 12 S. Dak. 324, 81 N. W. 633; Naddy v. Deitz, 15 S. Dak. 26, 86 N. W. 753; Blish v. McCormick, 15 Utah, 188, 49 Pac. 529; Summit Co. v. Gustaveson, 18 Utah, 351, 54 Pac. 977; Garner v. Van Patten, 20 Utah, 342, 58 Pac. 684; McIntyre v. Ajax Min. Co., 20 Utah, 323, 60 Pac. 552; Jenkins v. Columbia Land etc. Co., 13 Wash. 502, 43 Pac. 328; Sweeney v. Pacific Coast Elevator Co., 14 Wash. 562, 45 Pac. 151; Jenkins v. Powe, 19 Wash. 113, 52 Pac. 520; Washington Mill Co. v. Marks, 27 Wash. 170, 67 Pac. 565; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 934, denying rehearing, 63 Pac. 580.

3 Van Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518.

fectiveness of allegation, wholly fails to state a cause of action or a defense. Thus, where there was no affidavit to an answer denying the execution of an indorsement to an answer, but no objection was made to the answer on that ground in the lower court, the supreme court overruled the objection taken there for the first time, saying: "If the plaintiff deemed the answer insufficient to controvert the allegation of indorsement, he should have put his case in the district court upon that ground, and thus the defendant would have known the real objection to his answer, and might have made an application to the court for permission to amend, or to withdraw his answer and substitute another in its place. But the plaintiff tried the cause in the same manner as if the averments in the complaint had been properly controverted by the answer, and then, when the cause comes into this court, the objection to the insufficiency of the answer is raised for the first time on the second argument of the cause. We think the proper practice to be established is, that if the plaintiff considers the answer a nullity, he should raise the point in the court below and have it passed upon; and that if he there rests his cause on the ground of the want of an affidavit, he ought not to be permitted to say here, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint."[4] So the respondent (plaintiff) will not be permitted to avail himself of defects in the answer of the defendant, real or supposed, as precluding the defendant from objections, otherwise well made, to the admissibility of the evidence offered at the trial, where he had tried the case on the theory that the answer presented sufficient denials to the allegations of the complaint.[5] On the same principle, it was held that where defendants, in an action

4 Grogan v. Ruckle, 1 Cal. 193, 196. See, also, McCullough v. Clark, 41 Cal. 298; Kuhland v. Sedgwick, 17 Cal. 123, 128; applying rule to unverified complaint: People ex rel. etc. v. Reis, 76 Cal. 269, 18 Pac. 309, holding that the objection that the petition or complaint for a writ of mandate is not verified as required by statute is too late when raised on appeal for the first time, and that the affidavit is waived if the parties go to trial in the court below without objection to the lack of an affidavit.

5 White v. San Rafael etc. R. Co., 50 Cal. 417; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

to remove a cloud and quiet title, themselves submitted to the determination of the court by their answer, the very issue appellants sought to submit, and obtained the relief for which they prayed, they could not, upon an appeal by plaintiffs therefrom, be heard to say that the plaintiffs originally mistook their form of action.[6] And where answers of intervention were filed

6 Bates v. Drake, 28 Wash. 447, 68 Pac. 961. This case is an excellent illustration of the rule above stated. In an able opinion by Justice Fullerton the court said: "As a preliminary question, the respondents insist that the appellants cannot maintain this action. It is said that, as their complaint does not allege, and it was not shown by the evidence, that the land in controversy was in the possession of the appellants, or that the same was vacant at the time the suit was instituted, the appellants cannot recover, because a plaintiff must allege and prove one or the other of these facts before he can maintain an action to quiet or remove a cloud from title. . . . . The fact that the plaintiff is or is not in possession, or that the land is or is not vacant, does not affect the jurisdiction of the court to determine the subject matter of the controversy between the parties, nor does it affect the merits of that controversy, but affects only the plaintiff's right to have the merits of the controversy determined in that particular form of action. Being so, it is a right which the defendant can waive, and when he does so, and consents to a trial upon the merits, the judgment entered therein is not void, or voidable even, except for errors committed in the course of the trial which would render the judgment voidable were the plaintiff's right to maintain the action absolute: Hooper v. Henry, 31 Minn. 264, 17 N. W. 476; Mitchell v. McFarland, 47 Minn. 535, 50 N. W. 610. The question not being jurisdictional, it may be doubtful whether the respondents can urge it upon the appeal of their adversary; but, passing this, it is clear that they have waived the objection. After their demurrers were overruled, they not only answered by denials and by affirmative matter constituting a defense, but they answered by a pleading in the nature of a cross-complaint, in which they pleaded title in one of themselves by virtue of the deed the appellants sought to have canceled, praying that the appellants' muniments of title be held void and a cloud upon such title, thus submitting to the determination of the court the very issue the appellants sought to have submitted. What is more, they obtained the relief for which they prayed. Certainly they cannot, on an appeal by their adversaries from the judgment granting that relief, be heard to say that the appeal cannot be maintained because the appellants originally mistook the form of action in which they sought to submit to the court the question finally determined by it. They cannot hold to the benefits of the judgment and deny their opponents the right to

in the lower court, by persons not parties to the record, and the plaintiff made no objection, but went to trial, it was held he could not afterward raise the objection in the supreme court that it was irregular and erroneous to permit them to intervene.[7] Nor will the court consider an argument upon objections amounting to grounds of special demurrer merely, where none were interposed in the lower court.[8]

contest it on the ground that the controversy which led up to it was not before the court. On any theory, the appellants have the right to have the judgment entered reviewed by this court, and reversed, if not found to be consonant with the law and facts of the case. But we are clear that the appellants are entitled to something more—that they are entitled to have the whole of the controversy determined, because the respondents, by denying the appellants' title, and setting up title in one of themselves, and asking to have the question adjudicated, have waived the right to object to the form of the action."

7 Smith v. Perry, 44 Cal. 161; People ex rel. etc. v. Reis, 76 Cal. 269, 18 Pac. 309; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963, where it was held that order consolidating certain actions, and directing and providing for interventions, would not be reviewed on appeal, unless an exception to the order was taken in the court below. In the second case above, the court said: "It is argued on behalf of plaintiff that the complaint in intervention does not state facts sufficient to constitute a cause of intervention. This objection, which is in effect that the intervener had no right to intervene herein by reason of the insufficiency of the facts stated in the complaint, is raised for the first time in this court; and according to the well-settled rule here, the objection urged comes too late; McKenty v. Gladwin, 10 Cal. 228; Smith v. Penny, 44 Cal. 161; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963. The plaintiff took issue on the complaint of the intervener in the court below, without objection to it or exception of any kind, and the trial proceeded between the plaintiff and intervener on the issues joined. The objection then cannot be made for the first time on this appeal."

8 Gale v. Tuolumne Co. Water Co., 44 Cal. 43; Broadway Ins. Co. v. Walters, 128 Cal. 162, 60 Pac. 766; Raviez v. Nickells, 9 N. Dak. 536, 84 N. W. 353, holding that where a party sets forth facts by which he claims he has been damaged in a large sum, and goes to trial upon such facts before a jury, he cannot be heard after verdict and judgment against him to allege that the facts entitle him to equitable relief: Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643, holding that objection that affirmative defense contradicts denials theretofore introduced cannot be raised for the first time on appeal. The identical principle stated in the text, was involved in

It is a well-settled rule of practice that, though a total absence of allegation of a fact essential to a recovery, is available on appeal, even though no demurrer was interposed in the lower court, yet, where there is not an entire absence of allegation, and the objection merely goes to its defects, such objection cannot be successfully urged for the first time in the appellate court. In one such case, the court said: "The point was fully litigated on the trial, and in such case, the judgment will not be reversed upon the point taken here for the first time."[9] So, where an allegation of tender of payment in an equitable action for specific performance was lacking in certainty as to the time of the tender, the court said, that the tender should have been stated with greater particularity, but

Wood v. Currey, 49 Cal. 359, where the court said: "The objection that the remedy of the plaintiff was by motion in the original cause, and not by bill in equity, even if well founded in practice (a question upon which we express no opinion), will not be considered. The defendant made no motion in the court below to dismiss the bill, on that or any other ground, but answered to the merits. The cause was then referred, by consent of parties, to a referee, who was authorized to hear the evidence, and report a judgment to the court. Under these circumstances the objection upon the point of procedure, made for the first time before the referee, came too late." See, laso, Bibend v. Kreutz, 20 Cal. 110; Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752. In Broadway Ins. Co. v. Walters, supra, the court said: "The complaint in the present action gave the equity court jurisdiction, and the cause having been tried without objection to the method of procedure, we think it is too late to raise the question here for the first time."

[9] Lee v. Figg, 37 Cal. 328, 336, 99 Am. Dec. 271, and note. To same effect: King v. Davis, 34 Cal. 100. See, also, Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Cushing v. Pires, 124 Cal. 665, 57 Pac. 572; Larkin v. Mullen, 128 Cal. 449, 60 Pac. 1091; Baum v. Roper, 132 Cal. 42, 64 Pac. 128; Campbell v. Great Falls (City of) (Mont.), 69 Pac. 114; Duignan v. Montana Club, 16 Mont. 189, 40 Pac. 294; Mitchell v. Taylor, 27 Or. 377, 41 Pac. 119; Larsen v. Utah Loan etc. Co., 23 Utah, 449, 65 Pac. 208; Olsen v. Mansfield, 21 Wash. 706, 57 Pac. 808; Shephard v. Gove, 26 Wash. 452, 67 Pac. 256; Herrick v. Niesz, 16 Wash. 74, 47 Pac. 414.

the objection could not be taken for the first time on appeal.[10] Another excellent illustration of this limitation is shown in a case where, upon the coming on of the trial, the defendant moved for judgment on the pleadings, which was denied. The court said:[11] "So far as the record discloses to us, it appears that the parties went to trial in the court below without objection made upon the part of either to the pleadings of the other, as not permitting that other to be heard on the merits. The defendant's answer was there styled by himself a 'counterclaim,' and not a 'cross-complaint,' which he now says it is; and the trial proceeded on that idea. Under repeated rulings in this court, we will not hear the defendant assert here, for the first time, that he made a mistake in this respect—that his answer was, after all, a 'cross-complaint'; that its allegations were not denied by plaintiff, and that, as a consequence, he is now entitled to judgment, over against the plaintiff on the pleadings." And where a complaint alleged the execution of a bond by the defendants, stating its terms, and set forth a copy thereof, omitting, however, the signature of the defendant, and the latter demurred to the complaint on several grounds, but not upon the ground of ambiguity, the court said: "The complaint distinctly avers the execution of the bond by all the defendants. The defendants, in their answer, have taken issue upon the averments, and the verdict is in favor of the plaintiff on the issues. It must be presumed that the omission of the name of the principal in the copy appended to the complaint is a clerical error. Upon the demurrer, in the form adopted in this case, the direct averment of the execution of the bond in the body of the complaint must prevail, as against the omission of the signature in the copy appended. It may be that there is a want of correspondence between the averment in the body of the complaint and the copy annexed, but if so, the most that can be said is, that the complaint is am-

10 Duff v. Fisher, 15 Cal. 376, 382.

11 McCabe v. Randall, 41 Cal. 136. Same principle in Tetrault v. O'Connor, 8 N. Dak. 15, 76 N. W. 225, holding that alleged error in refusing to direct a verdict at the close of plaintiff's evidence is deemed waived unless request therefor be renewed after all the testimony is in. See, also, Kaeppler v. Red River Bank, 8 N. Dak. 406, 79 N. W. 869.

biguous in this respect, and this objection was not specified as a ground of the demurrer under any head." [12] So, where it was insisted that the court erred in rendering a judgment in favor of a defendant, because his answer contained no prayer for judgment, the court said: "If this objection has any force it should have been raised in the court below, where the party would have been allowed to amend. It cannot be raised here for the first time." [13] Nor will an objection to a complaint, based upon uncertainty, be considered, though the uncertainty be carried into the judgment, where there was no demurrer or other objection in the lower court. In Tibbetts v. Moore,[14] the complaint described the land around a mill, upon which, as well as the mill, the foreclosure of a lien was sought, in these words: "With such convenient space of land upon the same as

12 Mendocino County v. Morris, 32 Cal. 145, 148; Seligman v. Armando, 94 Cal. 314, 29 Pac. 710. To same effect: Minturn v. Burr, 16 Cal. 107, 110. See Le May v. Baxter, 11 Wash. 649, 40 Pac. 122; and Jenkins v. Columbia Land etc. Co., 13 Wash. 502, 43 Pac. 328, holding that an objection that there was a misjoinder of parties, not made in the trial court, will not bo considered on appeal. Objections to statement of fact in form of conclusion of law cannot be first raised on appeal: Russ Lumber Mill Co. v. Garrettson, 87 Cal. 589, 592, 25 Pac. 747. In this case the court said: "It is urged for the appellant that the complaint was insufficient, because there was no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done; and hence, it is said, there was nothing to show that any sum ever became due under the contract from the owner to the contractors. It is true that neither the contract price nor the reasonable value of the work was specifically set forth in the complaint; and the averment that after the plaintiff gave Garrettson written notice that it had agreed to furnish the materials, there became and was due and owing from him to the contractors, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, was a statement of conclusions of law rather than of facts. And of course this statement, if tested by demurrer, would have been insufficient. It was, however, not so tested, nor was it in any way traversed by the answer. The point seems to be made here for the first time. Under such circumstances we think the complaint should be held sufficient in this regard."

13 Towdy v. Ellis, 22 Cal. 651, 660.

14 23 Cal. 208, 213.

may be required for the convenient use and occupation thereof," and the judgment of foreclosure followed this description. This defect being pointed out by the defendant on appeal, the court said: "In cases of this kind, it is proper for the court, by its decree, to define the amount and extent of the land connected with the mill, which is properly subject to the lien. The decree in this case, however, does not do so; and this is also urged as an objection. Such an omission will not invalidate the decree; but it renders it doubtful whether a purchase under it will acquire any land beyond that covered by the buildings. That question, however, is not properly before us; and it is not necessary to determine it. No objection of this kind seems to have been raised in the court below by demurrer or otherwise; nor does it appear that the appellants requested the court to define in its decree the extent of space around the mill to be subjected to the lien." And an objection to a complaint in an action against an administrator that it does not allege a presentation of the claim to the administration cannot be raised for the first time in the supreme court.[15]

15 Peterson v. Hornblower, 33 Cal. 278. To same effect: Drake v. Foster, 52 Cal. 225; Bank of Stockton v. Howland, 42 Cal. 129; Coleman v. Woolworth, 28 Cal. 568; Hentsch v. Porter, 10 Cal. 555; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811. In the last case cited, the court set forth the principle and its underlying reasons as follows: "Appellant's counsel contend that, inasmuch as the complaint was not amended after the substitution of the executrix, by adding thereto an averment that the claim had been regularly presented to and rejected by the executrix, it is insufficient to support the judgment. But as no such objection was made in the court below, and as defendant expressly admitted on the trial that the claim had been presented to the executrix in due time, and that she had refused to act upon it, and made no objection on the ground that it was not presented in due form, it is too late to make the objection that the presentation and rejection of the claim were not alleged in the complaint, for the first time, on this appeal: Hentsch v. Porter, 10 Cal. 555; Coleman v. Woodworth, 28 Cal. 568; Bank v. Howland, 42 Cal. 130; Drake v. Foster, 52 Cal. 225. The object of the statutory requirement of presentation and rejection of claims against estates as a condition precedent to the commencement of suits upon them is to save to estates of deceased persons the costs and expenses of useless suits—suits to recover what would have been allowed and paid by the executor or administrator without suit. The merits of such claims do not depend in any degree upon

There are many cases in which the appellate court refused to pass upon objections made in the lower court, because no exception was taken to the ruling thereon.[16] Thus, in Potter

their presentation and rejection before suit. The defense that a claim had not been presented and rejected before suit does not question either the validity or the maturity of the claim but simply challenges the remedy by suit on the ground that another remedy provided by law has priority, and should be exhausted before commencement of suit. In other words, that the demand, or some part thereof, should be disputed and rejected, in the mode prescribed by law, before the commencement of suit. For these reasons, it has been decided in the cases above cited that the defense to a claim against an estate, that it had not been presented to and rejected by the executor or administrator before the commencement of suit upon it, is of the nature of a defense in abatement, which is presumed to be waived if not expressly made in the court of original jurisdiction, and that it will not be first heard and considered on appeal."

16 Sierra etc. Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; cited 92 Cal. 151, 28 Pac. 218; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Nyhart v. Pennington, 20 Mont. 158, 50 Pac. 413; Haggin v. Saile, 23 Mont. 375, 59 Pac. 154; Currie v. Montana Cent. Ry. Co., 24 Mont. 123, 60 Pac. 989; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Paul v. Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; Schwartz v. Stock (Nev.), 65 Pac. 351; McInnis v. McGurn, 24 Nev. 370, 55 Pac. 304; rehearing denied; McGurn v. McInnis, 24 Nev. 370, 56 Pac. 94; First Nat. Bank v. McClellan, 9 N. Mex. 636, 58 Pac. 347; Southern Cal. Fruit Exchange v. Stamm, 9 N. Mex. 361, 54 Pac. 345; Chavez v. Myers (N. Mex.), 68 Pac. 917; Ha[illegible] v. Harsch, 29 Or. 562, 46 Pac. 141; Wild v. Union Pac. R. Co., 23 Utah 265, 63 Pac. 886; Lebcher v. Lambert, 23 Utah, 63 Pac. 628; Nebeker v. Harvey, 21 Utah, 363, 60 Pac. 1029; Bragger v. Oregon S. L. R. Co., 24 Utah, 391, 68 Pac. 140; Jenkins v. Mammoth Min. Co., 24 Utah, 513, 68 Pac. 845; Washington Brick, Lime etc. Co. v. Adler, 12 Wash. 24, 40 Pac. 383, and Stoddard v. Seattle Nat. Bank, 12 Wash. 658, 40 Pac. 730, followed. City of Montesano v. Blair, 12 Wash. 188, 40 Pac. 731; Sweeney v. Pacific Coast Elevator Co., 14 Wash. 562, 45 Pac. 151; Titlow v. Cascade Oat Meal Co., 15 Wash. 652, 47 Pac. 19; Hartigan v. Hoffman, 16 Wash. 34, 47 Pac. 217; Carstens & Earles v. Leidigh etc. Lumber Co., 18 Wash. 450, 63 Am. St. Rep. 906, 51 Pac. 1051; Philadelphia Mortgage etc. Co. v. City of New Whatcom, 19 Wash. 225, 52 Pac. 1063;

v. Carney,[17] the court said: "It is contended by the appellants that, under the pleadings, no evidence of prior possession was admissible and there would be force in the objection if an exception to such evidence had been taken on the trial; this was not done, and the objection cannot be raised here for the first time."

And where, although an exception was taken, the same result will follow if the record fails to disclose what, if any, objections were interposed.[18] The general rule herein is that ob-

Home Savings & Loan Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Arey v. Arey, 22 Wash. 261, 60 Pac. 724; Olson v. Snake River Val. R. Co., 22 Wash. 139, 60 Pac. 156; Payette v. Willis, 23 Wash. 299, 63 Pac. 254; Syndicate Imp. Co. v. Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60; Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280; Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756. Wholesale exceptions are of no avail on appeal, unless the whole charge or instruction is erroneous: Paul v. Cragnaz, 25 Nev. 293 (denying rehearing, 59 Pac. 857.), 60 Pac. 983; Scott v. Utah Consol. Min. etc. Co., 18 Utah, 486, 56 Pac. 305; Wall v. Niagara Mining etc. Co. of Idaho, 20 Utah, 474, 59 Pac. 399; Wild v. Union Pac. R. Co., 23 Utah, 265, 63 Pac. 886.

[17] 8 Cal. 574. To same effect, Covillaud v. Tanner, 7 Cal. 39. The exceptions must not be too broad. In Frost v. Grizzly Bluff C. Co., 102 Cal. 525, 527, 36 Pac. 929, the court said: "Moreover, the main alleged errors relied upon by appellant occur in the instructions given by the court of its own motion; and to these there are no sufficient exceptions. The exceptions are in these words: 'We except to the instructions the court gave for the plaintiff, to such as he refused to give for defendant, to such as he modified, and such as the court gave of its own motion.' It would not be contended that all of the instructions given by the court of its own motion are erroneous; and the parts thereof considered erroneous should have been specifically pointed out, in the absence of a stipulation by respective counsel waiving all but a general exception: Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103, and note, 85 Am. Dec. 103; Sill v. Reese, 47 Cal. 348; Robinson v. Western Pacific R. R. Co., 48 Cal. 425; Rogers v. Mahoney, 62 Cal. 613. In the latter case the court refers to the other authorities, and thus states the rule: 'The whole charge cannot be excepted to generally. The exceptions should be sufficiently specific to call the attention of the court to the alleged error.'"

[18] Cases of failure to object to evidence: Estate of Doyle, 73 Cal. 564, 15 Pac. 125; Covillaud v. Tanner, 7 Cal. 38; Potter v. Carney, 8 Cal. 574; Bliss v. Ellsworth, 36 Cal. 310; Russell v. Dennison,

jections to evidence will not be noticed in the appellate court, unless taken in the lower court, in the first instance, if they be of a character which might there have been obviated by the production of other evidence, or the release of the interest of the witness, or an amendment to the pleadings, or in any other way.[19] And although an objection may have been made in the lower court, it will not be noticed unless directed at the specific point of objection sought to be made for the first time in the appellate court. In Mamlock v. White,[20] the court said:

45 Cal. 337; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131; Colton Land v. Water Co., 99 Cal. 278, 33 Pac. 878; Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811; People v. Keeley, 81 Cal. 210, 22 Pac. 593; Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134. Rule applied in cases of failure to object to evidence on ground of variance: Knox v. Higby, 76 Cal. 264, 18 Pac. 381; Dikeman v. Norrie, 36 Cal. 94; Bell v. Knowles, 45 Cal. 193; Yik Hon v. Spring Valley Water Works, 65 Cal. 619, 4 Pac. 666; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594. See Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 Pac. 9; Greene v. Finnell, 22 Wash. 186, 60 Pac. 144; Uren v. Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174; Currey v. Butcher, 37 Or. 380, 61 Pac. 631; Aldrich v. Columbia Southern Ry. Co., 39 Or. 263, 64 Pac. 455. The rule applies where the evidence received without objection is not the best evidence; and where the giving of a note and its contents were proven by witnesses without objection it was held that the note was as much in evidence as if it had been proven by the production of the written instrument itself: People v. Mauritzen, 84 Cal. 37, 24 Pac. 112.

19 Mott v. Smith, 16 Cal. 534, 555; McDonald v. Bear Riv. etc. Co., 13 Cal. 220, 236. See, also, Randall v. Yuba County, 14 Cal. 220; Bell v. Knowles, 45 Cal. 193; Estate of McCarthy, 58 Cal. 35; Tebbs v. Weatherwax, 23 Cal. 58; McCloud v. O'Neal, 16 Cal. 392; King v. Meyer, 35 Cal. 646; Gordon v. Clark, 22 Cal. 534, 83 Am. Dec. 82; Loucks v. Edmondson, 18 Cal. 203; De Leon v. Higuera, 15 Cal. 483; Baker v. Joseph, 16 Cal. 173. For other discussion and later authorities, see ante, chapter 22.

20 20 Cal. 598, 601. To same effect: Mayo v. Mazeau, 38 Cal. 442, 449; Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330; Bromley v. Flint, 87 Cal. 471, 25 Pac. 683; White v. National Bank, 98 Cal. 166, 32 Pac. 979; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208; People v. Findley, 132 Cal. 301, 64 Pac. 472; Schultz v. O'Rourke, 18 Mont. 418, 45 Pac. 634; Wells, Fargo & Co.'s Express v. Walker, 9 N. Mex. 456, 54 Pac. 875; Chilson v. Bank, 9 N. Dak. 96, 81 N. W. 33; Schweinber v.

"No objection was made by the plaintiff to the introduction of this proof on the part of the defendant, on the ground that the proper foundation had not been laid, neither in general terms, nor by any specific objection that the bond and affidavit had not been proved, nor that the attachment debts had not been proved; nor was any specific exception taken on these grounds to any ruling or charge of the court; nor was the

Great Western Elevator Co., 9 N. Dak. 113, 81 N. W. 35; Aldrich v. Columbia Southern Ry. Co., 39 Or. 263, 64 Pac. 455; First Nat. Ex. Bank v. Sherman, 9 S. Dak. 492, 70 N. W. 647; Gustin v. Jose, 11 Wash. 348, 39 Pac. 687; Guarantee Loan and Trust Co. v. Galliher, 12 Wash. 507, 41 Pac. 887; Chezum v. Parker, 19 Wash. 645, 54 Pac. 22; Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643; Blewett v. Bash, 22 Wash. 536, 61 Pac. 770. In Frank v. Pennie, supra, the court said: "Under proper objection the evidence was inadmissible. The book was not a tradesman's book of original entry, which after certain formal proofs is admissible in evidence. It contained merely declarations of Spanier in his own interest made to and set down by his clerk. They were clearly declarations in his interest, since their effect, if admissible as evidence, would be to enable Spanier to avoid the payment of a debt. But plaintiff's objection does not present the point. The question was objected to only as being leading. This objection was properly overruled. Appellant will not here be allowed to enlarge his grounds of objection, and urge new ones not presented in the first instance to the trial judge: Clarke v. Huber, 25 Cal. 593; McKay v. Riley, 65 Cal. 623, 4 Pac. 667; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Howland v. Oakland etc. Ry. Co., 110 Cal. 513, 42 Pac. 983. Again in the same opinion: "This evidence also, under proper objection, should have been excluded. Like that just considered it is hearsay evidence of the declaration of a party in his own interest, not against it. But no ground of objection was presented to the trial court, and its ruling is not, therefore, open to review." In Schultz v. O'Rourke, supra, the court said: "But if we concede that there was no waiver of formal tender before trial, still our decision may be safely put upon another ground. Upon the trial there was a formal tender of two thousand five hundred shares, indorsed in blank, it appears, and a demand of the return of two thousand five hundred dollars paid for the stock. This was refused by defendant 'on the ground that it is attached according to my information, and I want everything straightened up before I accept it.' No objection was made to the sufficiency of the tender or to its form, except that the stock was attached, as defendant was informed. The defendant cannot now urge any reason for refusing the stock offered on the trial

court requested to give any ruling or charge upon the subject; nor is the matter specified as a ground of error in the statement on appeal. After the question as to the validity of this sale had been thus put in issue and tried on its merits, without any objection of this kind being raised, we think it too late to raise it for the first time on the argument of the appeal in this court."

The rule against consideration of objections not properly taken in the lower court is not limited in its application to such as might have been made to evidence and pleadings. When the appeal is from an order denying a motion, no ground which might have justified the lower court in granting the motion, which was not presented, will be considered on appeal.[21] It was so held where the court, in rendering judgment, found that "due and legal written notice" had been served, and the motion was to set aside the judgment for want of notice, but the specific grounds of the motion did not appear.[22] The same result follows where the record does not contain the evidence offered, so as to enable the court to judge of its admissibility or sufficiency.[23] And where it was urged that a cause should have been dismissed, upon the ground of a lack of diligence in its prosecution, the court said: "If the question of diligence, in fact, and under the actual circumstances of the case as they may be ascertained to exist, is to be made, it ought to be presented to the court below in the first instance, upon notice given so that the plaintiff may have an opportunity to present the facts upon which he relies to establish the proper degree of diligence upon his part. No such

other than that expressly relied on. He is held to have waived the objections that plaintiff did not have the stock in her own name: Wood v. Babb, 16 S. C. 427; Lathrop v. O' Brien, 57 Minn. 175, 58 N. W. 987; Whelan v. Reilly, 61 Mo. 565; Thayer v. Meeker, 86 Ill. 470; Herberger v. Husman, 90 Cal. 583, 27 Pac. 428."

21 See Coburn v. Ames, 80 Cal. 243, 22 Pac. 174.

22 Wood v. Orford, 56 Cal. 157. To same effect, Raimond v. Eldridge, 43 Cal. 506, applying rule to case of failure to state ground in motion for nonsuit: Markley v. Rand, 12 Cal. 175, applying rule in case of misnomer.

23 See ante, § 432; post, § 687.

proceeding appears to have been as yet attempted upon the part of the defendant in the court below."[24]

Nor can any point be made on appeal on the ground of irregularities occurring in the lower court, unless, the opportunity being afforded, timely objection was made in proper form,[25] for instance, where a party attended at the place to which the trial had been changed without objecting.[26]

The foregoing is the controlling principle in all cases where objections are first made on appeal from the judgment, where the party's remedy was by motion for new trial.[27]

[24] Poole v. Caulfield, 45 Cal. 107. Same rule applied as to objection to costs: Stoddard v. Treadwill, 29 Cal. 282.

[25] See Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Ryan v. Fitsgerald, 87 Cal. 345, 25 Pac. 546; Shain v. Peterson, 99 Cal. 486, 33 Pac. 1085; State v. Abrams, 11 Or. 169, 8 Pac. 327; Watson v. Southern Or. Co., 39 Or. 481, 65 Pac. 985; Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Weigle v. Cascade Fire etc. Ins. Co., 12 Wash. 449, 41 Pac. 53; Rawson v. Ellsworth, 13 Wash. 667, 43 Pac. 934; McClellan v. Gaston, 18 Wash. 472, 51 Pac. 1062; Fleischner v. Beaver, 21 Wash. 6, 56 Pac. 840; Bignold v. Carr, 24 Wash. 413, 64 Pac. 519; Shoemaker v. Lumber etc. Mill Co., 27 Wash. 637, 68 Pac. 380; Hogan v. Peterson, 8 Wyo. 549, 59 Pac. 162.

[26] De Leon v. Heguera, 15 Cal. 483.

[27] See Douglas v. Kraft, 9 Cal. 562; Ornbaum v. His Creditors, 61 Cal. 455; Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811; Bode v. Lee, 102 Cal. 583, 36 Pac. 986; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Newhall v. Porter (Ariz.), 62 Pac. 689; Svea Ins. Co. v. McFarland (Ariz.), 60 Pac. 936; Glencross v. Evans (Ariz.), 36 Pac. 212; Sweetser v. Mellick (Idaho), 51 Pac. 985; Beatty v. Murray Placer Min. Co., 15 Mont. 314, 39 Pac. 82; Withers v. Kemper, 25 Mont, 432, 65 Pac. 422; Rogers v. Richards, 8 N. Mex. 658, 47 Pac. 719; Jones v. McQueen, 13 Utah, 178, 45 Pac. 202; Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098; Harris v. Van de Vanter, 17 Wash. 489, 50 Pac. 50; Roberts v. Washington Water Power Co., 19 Wash. 392, 53 Pac. 664; Moran v. Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101; Johnson v. Golden, 6 Wyo. 537, 48 Pac. 196; Hogan v. Peterson, 8 Wyo. 549, 59 Pac. 162; Lovejoy v. Campbell (S. Dak.), 92 N. W. 24; Haggarty v. Strong, 10 S. Dak. 585, 74 N. W. 1037; Plano Mfg. Co. v. Person, 12 S. Dak. 448, 81 N. W. 895; Giles v. Hawkeye G. M. Co., 11 S. Dak. 222, 76 N. W. 928; Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802, 53 N. W. 747; Norwe-

§ 672. Limiting review by stipulation or waiver.

It is well settled that counsel may, by stipulation, select one or more questions actually raised upon the record, and decisive of the case, and limit the inquiry of the court to the point or points so raised and covered by the stipulation. And the stipulation need not necessarily be filed or separately presented in the appellate court. It may be incorporated in the record on appeal before its transmission from the trial court. Thus, effect was given to a stipulation, after the notice of appeal was served, that a certain sum was due, "hereby waiving all errors in record, referee's returns of amount due, also decree and execution."[28] And where there is a stipulation of the parties to an appeal, the effect of which is to render certain objections made upon the appeal mere moot questions, the determination of which would be of no material consequence to the appellant, such questions will not be passed upon.[29]

This legitimate limitation may be placed upon the scope of review, without regard to the limitations of the record, otherwise than by stipulation. A point may be waived in the briefs. Thus, in Hatch v. Galvin,[30] the appellant in his brief, stated that "in order to spare the court the labor of looking through

gian Plow Co. v. Belton, 4 S. Dak. 384, 57 N. W. 17; Gode v. Collins, 8 S. Dak. 322, 66 N. W. 466.

28 Glatzback v. Foster, 11 Cal. 37. To same effect, Hilm v. Courtis, 31 Cal. 398.

29 Illinois T. & S. B. v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60.

30 50 Cal. 441. See, also, People v. Woon Tuck Wo., 120 Cal. 294, 52 Pac. 833; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Thomas v. Lane (Ariz.), 37 Pac. 470; Rehberg v. Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; Schatzlein Paint Co. v. Godin, 24 Mont. 483, 62 Pac. 819; Matirsevitz v. Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467; Ashe v. Beasley, 6 N. Dak. 191, 69 N. W. 188; Narregang v. Brown Co., 14 S. Dak. 357, 85 N. W. 602; Benedict v. Smith, 10 S. Dak. 35, 71 N. W. 139; Nordin v. Berner, 15 S. Dak. 611, 91 N. W. 308; Scott v. Gage (S. Dak.), 92 N. W. 37; First Nat. Bank v. Brown, 20 Utah, 85, 57 Pac. 877; Harriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Seattle & M. R. Co. v. Raeder (Wash.), 70 Pac. 498; First Nat. Bank v. Ludvigsen, 8 Wyo. 230, 80 Am. St. Rep. 928, 56 Pac. 994, 57 Pac. 934; denying rehearing; 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934.

the record at large, we had as well state that we rely solely upon the proposition that the complaint does not state facts sufficient to constitute a cause of action." The court thereupon considered only the point thus reserved and refrained from passing upon the correctness or incorrectness of the order denying a new trial.

The review of a question may also be obviated by an admission in appellant's brief.[31] And mere suggestions of error in appellant's brief, without argument or statement of reasons or authorities to show why the rulings were erroneous, will not be considered of sufficient importance to merit notice in the opinion of the court.[32] But where the rulings of the trial court, in giving certain instructions asked for by the plaintiff, and refusing other instructions upon the same subject matter asked for by the defendant, are duly excepted to by the defendant, and specified as errors of law in the statement on motion for a new trial, the discussion by the defendant, in his

31 See Consolidated Nat. Bank of San Diego v. Hayes, 112 Cal. 75, 44 Pac. 469, where the existence of a stipulation in the lower court was admitted. See also, O'Donnell v. Gainan, 17 Mont. 490, 43 Pac. 713.

32 People v. McLean, 135 Cal. 306, 67 Pac. 770. To same effect, Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; People v. Gibson, 106 Cal. 458, 39 Pac. 864; United States v. Rio Grande Dam etc. Co. (N. Mex.), 65 Pac. 276; Cevada v. Miera, 10 N. Mex. 62, 61 Pac. 125; Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306. Unless assignments refer to the abstract they will be disregarded: Hasletter v. Brooks El. Co., 4 N. Dak. 357; Schmitz v. Heger, 5 N. Dak. 165. In Washington under the statutory requirement that appellant must clearly point out in his brief the errors relied upon for a reversal, assignments which make no reference to the fifth finding and merely allege that, "under the proofs, the first three findings of the lower court are wholly immaterial; that the fourth is absolutely contradicted by the testimony; . . . . as to the sixth and seventh findings, neither of them is worthy of notice"—are insufficient: Perkins v. Mitchell, Lewis & Staver Co., 15 Wash. 470, 46 Pac. 1039. By rule of court in Washington the appellant is required to print in his brief the findings of fact and exceptions thereto, and in case of their omission and absence of excuse therefor or offer to correct the defect the supreme court will not look into the evidence to ascertain if the findings are supported: Interstate S. & L. Assn. v. Benson, 28 Wash. 578, 68 Pac. 1038.

brief upon appeal, of only the ruling refusing the instructions asked for by him, is not a waiver or abandonment of his exceptions to the giving of the plaintiff's instructions, where it appears that the argument made in the brief necessarily involves a similar argument upon the instructions given.[33]

There is a point at which the burden of argument shifts from the appellant to the respondent in certain cases, and especially in cases of voluminous records; and in the absence of a brief or argument for the respondent, upon specifications by appellant of the insufficiency of the evidence to sustain the findings, it will be presumed that the evidence is insufficient to support the findings, and a reversal for such insufficiency will be justified.[34] Points may also be waived at the hearing on oral argument.[35] So, where errors were assigned upon

33 Shade v. Sisson (The) Mill & L. Co., 115 Cal. 357, 47 Pac. 135.

34 Lawrence v. Johnson, 131 Cal. 175, 63 Pac. 176; Mountain Tunnel G. M. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Davis v. Hart, 103 Cal. 530, 37 Pac. 486; Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872; Richter v. Fresno Canal etc. Co., 101 Cal. 582, 36 Pac. 96. Where the brief does not refer to the pages where evidence alleged to have been erroneously admitted is shown, the assignments will not be considered: Gregg v. Kommers, 22 Mont. 511, 57 Pac. 92. In the first case, the court said: "At least in the absence of a brief or oral argument on behalf of respondent, we must regard the findings as unsupported by the evidence." In the second case, the court said: "Appellant insists that findings numbered 33, 35, and 36, are not supported by the evidence. The facts covered by those findings relate solely to the rights and claims of defendant and respondent Bryan, and as he has not deemed the matter of sufficient importance to appear before this court, either by oral or written argument, and point out, in a somewhat voluminous record, where the evidence may be found which supports these findings of fact, we will assume there is no such evidence; and for that reason will order a new trial of the entire case as to respondent Bryan." In Davis v. Hart, supra, the court said: "There is no brief on file by respondent, nor was the case orally argued in his behalf. As the record shows that the findings are attacked by the specifications on the ground of the insufficiency of the evidence to support them, it follows on the authority of Richter v. Fresno Canal etc. Co., 101 Cal. 582, 36 Pac. 96, that the judgment and order appealed from should be reversed." To same effect, Kelly v. Bradbury, supra.

35 Mulcahey v. Glazier, 51 Cal. 626. See, also, Drexler v. Seal Rock Tobacco Co., 78 Cal. 624, 21 Pac. 372; Faris v. Lampson, 73 Cal. 190, 14 Pac. 674.

an order denying a new trial, but the statement on the motion in the record on appeal was so defective that those errors could not be reviewed, the appellant was permitted to file a release thereof, and to rely upon others assigned upon the judgment-roll.[36]

It seems that it is not too late to waive a point raised upon appeal after the court has rendered its decision, the decision having been based upon a technicality. An appellant will sometimes be permitted to do this, and resubmit the case upon its merits.[37]

Where points are thus waived, they cannot be renewed and again urged upon petition for rehearing.[38]

But counsel cannot, where there exists a point vital to the appeal, eliminate or evade that, and, by stipulation, thrust upon the court a question which does not arise upon the record. Accordingly, where, on an appeal from an order denying a writ of prohibition from the superior court to a justice of the peace, the real, and the only question decided below was the propriety of the remedy sought, that alone was decided by the court, and a stipulation that the right to a jury trial before the justice should be the only point considered was ignored. In this the court took the same view as that taken by the lower court, saying:[39] "The court exhausted its authority on the application for the writ of prohibition, in determining, as it did, that the act sought to be prohibited was not in excess of the jurisdiction of the justice's court, and that the defendant had

36 Thompson v. Patterson, 54 Cal. 542.

37 Cahoon v. Levy, 10 Cal. 216. In the last case the court said: "In this case no oral argument was had, nor did the appellants file any points or authorities; and having thus omitted to point out the errors of which they complain, the judgment should be affirmed without an examination of the record: Mokelumne H. C. M. Co. v. Woodbury, 10 Cal. 188; Edmondson v. Alameda Co., 24 Cal. 350; Holm v. Roach, 25 Cal. 37; Hickinbotham v. Monroe, 28 Cal. 489; Brewster v. Johnson, 51 Cal. 222; Estate of Montgomery, 59 Cal. 583."

38 Atherton v. Supervisors, 48 Cal. 157, 160.

39 Powelson v. Lockwood, 82 Cal. 613, 616, 23 Pac. 143. See, also, McCallion v. Hibernia Sav. etc. Soc., 83 Cal. 571, 574, 23 Pac. 798; Ayers v. Burr, 132 Cal. 125, 64 Pac. 120; Boyd v. Southern California Ry. Co., 126 Cal. 571, 58 Pac. 1046.

a remedy by appeal. It could not, on that application, arrest or review the mere errors of the justice's court about to be committed within the province of its jurisdiction, and thus make the writ of prohibition, or the application for it, serve the purpose of an appeal. The same rule must be applied to the case here on this appeal; otherwise, this court must exercise mere appellate jurisdiction by means of a writ of prohibition, without any appeal, and in a case to which the appellate jurisdiction of this court does not extend. It is, therefore, unnecessary, for any purpose of this appeal, to decide whether or not the appellant was entitled to a jury trial in the justice's court, and the expression of an opinion upon this question would be improper, notwithstanding the stipulation of counsel, for the reason that such an opinion would have no bearing upon any material question to be decided, and no proper effect as authority or otherwise."

Waiver of points in the lower court is just as effectual to prevent review thereof as if waived on appeal.[40] Thus, the right to subsequently move to strike out inadmissible evidence is waived by the withdrawal of an objection made to it at the time it is offered.[41]

§ 673. Court may consider matters not alluded to in argument.

What was previously stated with reference to the duty of counsel to present the whole case in their briefs or in oral arguments, if there be an oral argument, may not be construed as necessarily to limit the investigation or basis of review and decision by the court. What the court is regularly called upon to do, and what the court is at liberty to do of its own accord, are distinct matters. The court may, and often does, decide the appeal upon questions raised by the record, whether referred to by counsel or not. In the opinion denying a rehearing in Hubbard v. Sullivan,[42] Baldwin, J., said: "In this case, the

40 See Estate of Wax, 106 Cal. 343, 39 Pac. 624.

41 Estate of Wax, 106 Cal. 343, 39 Pac. 624.

42 18 Cal. 508, 526. See, also, Will of Bowen, 34 Cal. 682, 688, where the constitutionality of a statute was passed upon though not raised by counsel: Prost v. Moore, 40 Cal. 347; Spier v. Baker, 120

point decided by the court, in its opinion, distinctly arose upon the facts. It is immaterial whether the point was taken in the argument or not, as the court is bound to decide according to the law of the whole case, and not according to the view or reasoning of counsel."

Opinions are not to be criticised for not following the line of argument offered by counsel. As was said in Holmes v. Rogers:[43] "An opinion is not a controversial tract, much less a brief in reply to counsel against whose views we decide. It is merely a statement of conclusions and of the principal reasons which have led to them."

§ 674. Decision of points not necessary to be passed upon.

As a rule, the court declines to discuss questions not necessary to be passed upon in reaching the final conclusion. But this rule is departed from where, upon reversal, the question is likely to arise in the lower court. Thus, in Manly v. Howlett,[44] after having disposed of the appeal by reversing the judgment and ordering a new trial, on account of conflict between findings, the court proceeded to declare its views upon other questions in controversy, for the guidance of the lower court and the parties upon a retrial. And though a question be not necessarily involved in the decision, yet its public interest and importance may merit attention and expression of an opinion by the court. Thus, in Higgins v. Houghton[45] the court said: "We have, in this opinion, passed upon all the questions raised and discussed by counsel—though to a disposition of the case a decision of one point only was essential—and we have done so for the reason that a decision of all the points made in argument is a matter of public interest, and, as we gather from the brief filed for the surveyor general is also a matter of urgent

Cal. 379, 52 Pac. 659, where the validity of a primary election act was decided upon a constitutional ground not alluded to in the elaborate briefs of counsel.

43 13 Cal. 202.

44 55 Cal. 94, 97. See, also, Revalk v. Kroerner, 8 Cal. 71; Richardson v. Wilson, 15 Cal. 44; Hicks v. Coleman, 25 Cal. 147; Anderson v. Fisk, 36 Cal. 634; Estate of Toomes, 54 Cal. 517, 35 Am. Rep. 83.

45 25 Cal. 253, 263. See, also, Will of Bowen, 34 Cal. 682, 688.

concern in his office." But, ordinarily, where neither of the above-mentioned conditions exist, the court will not decide non-essential questions, even though they be made the subject for argument by counsel.[46] The court seldom declares its views for future guidance in the case, unless by its decision a new trial is directed. Where a new trial is ordered, though not strictly necessary, the court frequently gives an opinion upon points that will arise in the lower court and have to be decided to finally terminate the case.[47]

§ 675. Review limited by the record—Whether point argued in lower court immaterial.

The refusal to examine immaterial points is based upon different grounds from the refusal to examine and decide questions not raised by the particular appeal. The grounds for declining to examine the latter are jurisdictional.[48] There are to be found many illustrations under this head, to the

46 See Gates v. Salmon, 46 Cal. 362, 379; West v. Smith, 5 Cal. 96; Sharon v. Sharon, 77 Cal. 102, 19 Pac. 230; Harris v. Smith, 132 Cal. 316, 64 Pac. 409; Schuur v. Rodenbach, 133 Cal. 85, 65 Pac. 298; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Crocheron v. Shea (Idaho), 57 Pac. 707; Daly v. Josslyn (Idaho), 65 Pac. 442; Gassert v. Black, 18 Mont. 35, 44 Pac. 401; Wetzstein v. Boston & M. Consol. C. & S. Min. Co., 26 Mont. 193, 66 Pac. 943; Tait v. Butte Butchering Co., 26 Mont. 262, 67 Pac. 1133; In re Kaeppler, 7 N. Dak. 307, 75 N. W. 253; Azzalia v. St. Claire, 23 Utah, 401, 64 Pac. 1106; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; Pool v. Southern Pac. Co., 20 Utah, 210, 58 Pac. 326; Wright v. Southern Pac. Co., 15 Utah, 421, 49 Pac. 309; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840; Sether v. Clark, 24 Wash. 16, 63 Pac. 1106; Gray v. Washington Water Power Co., 27 Wash. 713, 68 Pac. 360.

47 State v. McGlynn, 20 Cal. 234, 276, 81 Am. Dec. 118.

48 See Poole v. Wilber, 95 Cal. 339, 30 Pac. 548, holding that upon hearing of motion for alimony pendente lite and counsel fees in an action for the annulment of a marriage, the trial court cannot determine the issues raised by the pleadings, and that the supreme court has no jurisdiction to determine them upon appeal from an order granting such motion: Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522; Hellings v. Duvall, 131 Cal. 618, 63 Pac. 1017; Williams v. Long, 129 Cal. 229, 61 Pac. 1087; San Jose Ranch Co. v. San Jose L. & W. Co., 126 Cal. 322, 58 Pac. 824, Clancey v. Clancey, 7 N. Mex. 405, 37 Pac. 1105, 38 Pac. 168.

effect that upon appeals from orders on motion for new trial the sufficiency or insufficiency of pleadings will not be considered.[49] Nor upon appeal from an order denying a new trial, can an objection to the sufficiency of the findings be urged as a ground for reversal. It can only be considered as advisory in relation to further proceedings in the cause, upon reversal of the order.[50] But the pleadings will be examined as to their sufficiency where a new trial is granted for error in granting a nonsuit, as where the nonsuit was asked for on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained.[51] And all irregularities and errors may become wholly

49 See ante, § 388 et seq.; Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8, 17 Pac. 932; Hellings v. Duvall, 131 Cal. 618, 63 Pac. 1017; Bauer v. Fay, 128 Cal. 523, 61 Pac. 90.

50 Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Reclamation Dist. No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758.

51 Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846. In this case the court said: "But it is argued by counsel for appellant (plaintiff below) that on an appeal, as this is, from an order granting a new trial, the sufficiency of the complaint cannot be considered. To support this contention counsel make reference to several cases decided by this court, viz.: Spanagel v. Delinger, 38 Cal. 283; People v. Turner, 39 Cal. 372; Mason v. Austin, 46 Cal. 385; Jacks v. Buell, 47 Cal. 162; Onderdonk v. San Francisco, 75 Cal. 534, 17 Pac. 678, and Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119. In the cases cited the question presented is entirely unlike the one presented here. In this case the defendant moved for a nonsuit on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained. The nonsuit was denied, and an exception was regularly reserved. The defendant then found himself in a position where he had a right to have the ruling of the court on his motion reviewed on a motion for a new trial. The ruling of the court on defendant's motion for a nonsuit, and his exception thereto, could be set forth in a statement or bill of exceptions as an error of law occurring at the trial, and there excepted to by him that it might be reviewed as above set forth. This right was assured to him by the provisions of the statute: Code Civ. Proc., sec. 657, subd. 7, secs. 658, 659. On the hearing of the motion for a new trial, the court a quo had an opportunity of reversing its former action. If it ap-

immaterial by a conclusion on appeal that the complaint is fatally defective and incurable. In that case, the defendant (respondent) is entitled to have the judgment affirmed.[52]

A record may be so made up as to preclude a consideration of any point raised by an appellant. Thus, one finding may be of a character to preclude consideration of all other findings; and if there be no bill of exceptions upon which to attack that finding, there is nothing to consider.[53]

It is simply an exemplification of the rule that matters extrinsic of the record will not be considered when it is said that the question of how a particular error, or irregularity, or abuse of discretion, in the lower court occurred or was brought about is immaterial on appeal. It is only necessary that it appear that there was no consent or acquiescence on the part of the appellant. Whether he argued the point, or even was present, the proper exception having been noted, or it being an instance where an exception is presumed to be taken, are matters foreign to the inquiry in the appellate court. Any such doctrine (found in some early decisions) as that, in addition to objection or exception the party must be shown to have offered argument in the lower court, was long since exploded by adjudications. In Carder v. Baxter[54] it was insisted by the respondents that the appellant had abandoned his motion for a new trial

proved its previous ruling, the motion for a new trial would be denied. If its previous ruling was, in its judgment, erroneous, it was empowered to recall it and grant a new trial. On such hearing it was in the line of the regular procedure to confirm its former action or disapprove and recall it. Such course the law sanctions as applicable to all errors of law. An error committed in passing on a motion for a nonsuit constituted no exception to the rule. Whether the court denied or granted a new trial, its action was subject to be revised on appeal. The plaintiff had a right to appeal from the order granting a new trial, and his appeal would bring before the court the action of the court below as to every question germane to the inquiry whether the lower court's action was in accordance with law or not."

52 Lockhart v. Wills, 9 N. Mex. 344, 54 Pac. 336. Judgment affirmed, Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. Rep. 65, 45 L. ed. 979.

53 Williams v. Savings Soc., 133 Cal. 360, 65 Pac. 822.

54 28 Cal. 99, 101.

by refusing to argue it. But the court held the point not well taken, saying: "The statement sets forth specifically the grounds of the motion—the motion was duly made and submitted—and this includes everything essential to a prosecution of the proceeding." And the principle is applied where the party against whom the order is made, or the proceeding taken, is absent at the time.[55] And where the law does not make it the duty of a party to except, it is immaterial that he, though present, remains passive and silent. Thus, where a motion for judgment on the pleadings was granted, and the order recited that there was no opposition to the motion, the supreme court, finding the order was erroneous, reversed it, saying: "The record does not show that the defendant's attorney was present in court, and, if he did not appear to the motion, there can be no inference that he consented to the judgment. If, however, he had been present, it may be that he was only passive and silent, and in that sense made no opposition to the judgment, choosing to stand upon his legal rights, and leaving the court to decide the question as it saw fit, without any suggestion from him."[56]

There is an apparent exception to this principle in the case of the hearing for new trial on the minutes, in which case the statement, subsequently settled, must show what grounds were argued. But the practical construction and application of that requirement are elsewhere considered.[57]

§ 676. Limitation by consent.

While, as before stated, consent to an adverse judgment, or order, will never be presumed from mere silence, where the law does not require the party to except, yet, if it appear affirmatively that he did consent, a different case is presented, calling for the application of a different rule. Thus, where the appeal was from the judgment alone, without a bill of exceptions, the

55 See Chabot v. Tucker, 39 Cal. 435; Lybecker v. Murray, 58 Cal. 186.

56 San Francisco v. Certain Real Estate, 42 Cal. 518. See, also, Myers v. South Feather Water Co., 10 Cal. 582; Fuller v. Ferguson. 26 Cal. 575; Vassault v. Seitz, 31 Cal. 228.

57 See ante, § 378 et seq.

court said: "The judgment was entered as appears by the recitals therein, 'on reading and filing the stipulation of the respective parties'—that is, by consent. Such consent was a waiver of the demurrer, and we are not called upon, therefore, to determine whether the demurrer was well taken."[58]

[58] Spinetti v. Brignardello, 53 Cal. 281. See, also, Jackson v. Brown, 82 Cal. 275, 23 Pac. 142; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Conway v. Supreme Council, 137 Cal. 384, 70 Pac. 223; Houghton v. Trumbo, 103 Cal. 239, 37 Pac. 152; Hamilton v. Huson, 21 Mont. 9, 53 Pac. 101; Crosby North Bonanza Silver Min. Co., 23 Nev. 70, 52 Pac. 583; Martin v. Eagle Development Co., 41 Or. 448, 69 Pac. 216; First Nat. Bank v. Bank, 5 N. Dak. 161, 64 N. W. 941; Clapton v. Clapton (N. Dak.), 91 N. W. 46. In Houghton v. Trumbo, supra, it was held that where findings are made upon an interlocutory decree for an accounting, and it is stipulated by the parties that findings other than those filed upon the rendition of the interlocutory decree are waived, it cannot be objected upon appeal that the findings are not full enough. In Conway v. Supreme Council, supra, it was held that where findings were waived because the facts were stipulated, the stipulated facts become part of the judgment-roll and the findings upon which the judgment rests; and no presumption can be indulged upon appeal against any stipulated fact. In Moore v. Copp, supra, it was held that where issues as to matter in avoidance of the contract pleaded in defense, not involving its genuineness and due execution, were agreed upon and submitted to the jury without objection, the defendant cannot object upon appeal for the first time that such issues were not properly submitted. In Hamilton v. Hudson, supra, it was held that plaintiff (respondent) could not, on appeal, question the sufficiency of an answer which denied generally "every material allegation in the complaint." In Crosby v. North Bonanza etc. Co., supra, the court said: "The error claimed here consisted of passing on the motion for a new trial before the statement had been duly authenticated. But this is precisely what counsel stipulated should be done. That he stipulated that the motion should be passed upon, and as the statement was then incomplete and it is not shown or suggested, that he did not know of it, we must presume that he did, and intended it to be submitted in just the shape in which it then was. Doubtless, if the judge had reason to believe that the stipulation had been signed and submitted inadvertently he might have called counsel's attention to the condition of the record, when probably it would have been corrected, but this was a matter in his discretion, and we must not forget that it might have been the intention to submit the motion in just the shape in which it was done. If such were the case, then the judge's only duty was to pass upon it just as he did. At any rate, having stipulated for the judge to rule upon the motion, so long as such

Of course, an admission in a pleading is just as effectual to limit review as the most formal and solemn stipulation.[59]

It is an application of the same principle that the overruling of a demurrer by consent of the party interposing it prevents his making the order the subject of an assignment of error on appeal.[60] But this only applies where the defects at which the demurrer is aimed are susceptible of being cured by the verdict, or other decision. It does not apply where the pleading is inherently and vitally defective.[61] Nor does the rule

stipulation stands uncontroverted and unexplained, he cannot claim such ruling to constitute error: Thompson v. Connolly, 43 Cal. 636."

59 Goss v. Helbing, 77 Cal. 190, 19 Pac. 277.

60 Corryell v. Cain, 16 Cal. 567, 572; Conniff v. Kahn, 54 Cal. 283. This proposition likewise applies to orders on motion for new trial entered by consent: Meerholz v. Sessions, 9 Cal. 277.

61 Banburg v. Arnold, 91 Cal. 606, 27 Pac. 934; Hargett v. Beardsley, 33 Or. 301, 54 Pac. 203. The Oregon supreme court considered the consent immaterial on such appeals. In the second case above, the court said: "It had been suggested that a demurrer to the sufficiency of the complaint having been overruled by consent of the parties precluded the defendant from raising the same question by motion for judgment non obstante. The statute gives the right to the defendant, when the complaint does not state a cause of action, to interpose such motion, but upon condition that the objection has not been taken by demurrer: Hill's Ann. Laws, § 266. A similar rule prevailed at common law, which was that "after judgment upon demurrer there can be no motion in arrest of judgment for any exception that may have been taken on arguing the demurrer": Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 628, 14 N. E. 42; American Express Co. v. Pinckney, 29 Ill. 392; Quincy Coal Co. v. Hood, 77 Ill. 68. But this is perhaps more a matter of technical practice than of substance, as the objection for the cause named is never waived, and may be urged for the first time in the appellate court: Evarts v. Steger, 5 Or. 147; Booth v. Moody, 30 Or. 222, 46 Pac. 884; Wilson v. Myrick, 26 Ill. 34. There is, however, reason for its support, in that, the court having once passed upon the identical question in disposing of the demurrer, it becomes the law of the case in the court below in the subsequent proceedings; and, while it could not be said that the court below erred in refusing to entertain a motion for judgment non obstante after it had passed adversely upon a demurrer going to the same question, yet, the record being before us upon appeal, we may inquire whether the complaint, so objected to at either stage of the proceedings, or here for the first time, is so defective as to render it insufficient to sustain the judg-

that a judgment by consent will not be disturbed on appeal apply where the judgment is in contravention of the mandatory provisions of a statute.[62]

In all cases where consent is claimed as a bar to review on appeal, it must be clearly shown, and the court will fully consider the circumstances connected with the act claimed to constitute consent, or waiver of a right to review on appeal.

The right of review on appeal, being constitutional, is not waived unless the intent to waive it be clear.[63] Nevertheless, an act not in the form of express consent may be so inconsistent with any other construction as to be equivalent to consent.[64]

§ 677. Limitation by estoppel equivalent to consent.

Estoppel may have the same effect to cut off the right to assign error on appeal as express consent. And a denial by the court, on the objection of the defendant, of a motion to amend the complaint, by substituting a proper party for one improperly sued, will be considered as made at his instance and with his consent, so that he cannot subsequently complain in the appellate court of a misjoinder or nonjoinder of parties.[65]

ment: Chicago etc. Ry. Co. v. Hines, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021. In this view it becomes unnecessary to inquire what was the effect of overruling the demurrer by consent, or to consider the objections made to the introduction of evidence, and we will proceed at once to a consideration of the sufficiency of the complaint."

62 Ocobosk v. Nixon (Idaho), 57 Pac. 309.

63 See Barbour v. Flick, 126 Cal. 628, 59 Pac. 122; Kellogg v. Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; holding that where the ordinary rules relating to the admission of testimony are waived by consent of parties, the record should show the consent clearly.

64 See Lounsbery v. Erickson (S. Dak.), 92 N. W. 1071, where a plaintiff, by retaining the costs paid under an order vacating a default was held to have waived his right to appeal therefrom. But see Seattle (City of) v. Liberman, 9 Wash. 276, 37 Pac. 433.

65 Fulton v. Cox, 40 Cal. 101. See, also, Knoltin (A. J.) Co. v. Jones (Idaho), 63 Pac. 638, holding that a party who requests an instruction, which the court gives, but which conflicts with an instruction already given by the court, will not be heard, on appeal, to complain that the two instructions are inconsistent; Mullaney v.

So where a nonsuit was granted upon plaintiff's own motion, without his obtaining leave to move to set it aside, it was held that he could not appeal from the judgment entered thereon.[66] It is otherwise where such leave is obtained. In such case the proper practice is to save exceptions to rulings occurring during the trial, make the motion to set aside, and upon its being denied, appeal from the judgment entered thereon.[67] So if evidence be excluded, on objection of a party, he will not be afterward heard to urge that the decision is erroneous by reason of the absence of such evidence.[68] In consonance with this principle, a somewhat peculiar effect was given to a successful objection to evidence in Thompson v. McKay.[69] It appeared, on the face of a deed in evidence, that the property in question was already encumbered, and the plaintiff offered to prove that he had been compelled to disburse large sums to remove prior encumbrances and to preserve the trust fund for the security and satisfaction of the trust. On the objection of the defendant, this proof was excluded by the court. It was held that the defendant, having caused this proof to be excluded, could not afterward urge that plaintiff had failed to show how he applied the rents and proceeds of sales.

Evans, 33 Or. 330, 54 Pac. 886, holding that where improper instructions, given at defendant's request were in conflict with other portions of the charge, defendant cannot complain of the inconsistencies.

66 Insley v. Beard, 6 Cal. 666.

67 Natoma Water etc. Co. v. Clarkin, 14 Cal. 543.

68 Harp v. Harp, 136 Cal. 421, 69 Pac. 28. In this case the court said: "As to this latter point, to which much attention is devoted, the record shows that when plaintiff was on the witness-stand his counsel read to him a question intended to draw out the facts as to the agreement, but cautioned the witness not to answer until defendant's counsel had an opportunity to object, whch he promptly did, on the ground that it was immaterial and incompetent. Counsel for plaintiff stated, if objected to, he would not insist on it, as he thought the witness could not testify as to what occurred between him and his father prior to the latter's death. Defendant's counsel did not withdraw the objection, but seemed to concur in this view of the law. whether the testimony was admissible under section 1880 of the Code of Civil Procedure need not be decided. Suffice it to say that defendant's counsel cannot now be heard to claim that the judgment should be reversed because plaintiff failed to testify as to the facts and circumstances of the agreement."

69 41 Cal. 221, 230.

Consent may be so given as to amount to a virtual protest against the action of the court; and it is held that the rule now under consideration does not apply where the consent is with the proper reservations, or is given merely pro forma, for the purpose of expediting an appeal. In Meacham v. McKay,[70] the court said: If it appears from the record that it was intended by the parties to be only a pro forma judgment or order, entered by consent, for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid ruling to give to the stipulation a conclusive effect not contemplated by the parties. We adopt the more liberal practice of construing the stipulation as the parties understood it at the time. At the same time, we would not be understood as encouraging a loose practice in this respect, and recommend to attorneys greater care in framing stipulations, so as not to impose upon the court the necessity of construing doubtful clauses in them. The stipulation in this case on which the order denying a new trial was entered, is not free from doubt, but, taking it altogether, and construing it as a whole, in connection with the other facts disclosed by the record, we conclude that it was intended by the parties that the motion for a new trial should be denied pro forma, only to hasten the appeal; and that in consenting to the order the defendants did not intd to abandon their motion, or their objections to the rulings of the court on the various points raised on the trial."

§ 678. Limitation by rule against decision of facts.

The rule of appellate courts, that they will not decide questions of fact, is one of the most important of all the limitations upon the scope of inquiry on appeal. On many occasions, the supreme court must examine matters of fact shown by the record; but such examination is only incidental to decision on matters of law.[71] For instance, the court must scrutinize, and to a certain extent estimate, the probative value of evidence in order to determine whether a particular decision has any substantial support therein.

70 37 Cal. 154, 159.

71 For full discussion of this subject, see ante, §§ 633, 638.

Prior to the adoption of the Code of Civil Procedure, the supreme court of California would not investigate the sufficiency of evidence on appeal from the judgment. The only method of having the question of the sufficiency of the evidence considered, was by raising the question in the lower court by a motion for new trial.[72] And it was formerly held that the same rule did not apply in equity cases, in which it was held that the court would review the evidence without a motion for new trial. But, subsequently, it became well settled that the Practice Act was intended to be uniform in its application, and was as applicable to equity cases as to actions at law.[73]

The code provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."[74] Since the adoption of the code the two methods of review are concurrent.

It has been declared, in cases almost limitless in number, that, in cases of substantial conflict in the evidence, the decision of the lower court will not be disturbed.[75] Even where, as in California, the appellate court is not, except in criminal cases, limited in review by the constitution to questions of law, this rule prevails. And it is immaterial, in this respect, in what form the decision of the issue of fact is presented, whether

72 See Griswold v. Sharpe, 2 Cal. 23; Covillaud v. Tanner, 7 Cal. 38; Marzion v. Pioche, 8 Cal. 537; Leining v. Gould, 13 Cal. 598; Myers v. Casey, 14 Cal. 544; Deputy v. Stapleton, 19 Cal. 305; Allen v. Fennon, 27 Cal. 69, 85 Am. Dec. 231; Hihn v. Peck, 30 Cal. 286; Green v. Clark, 31 Cal. 593; Racoullat v. Rene, 32 Cal. 453; Keenan v. Allen, 33 Cal. 548; Rice v. Inskeep, 34 Cal. 226; Yates v. Smith, 40 Cal. 669; People v. Holloway, 41 Cal. 409; Rycraft v. Rycraft, 42 Cal. 445; Stockton v. Creanor, 45 Cal. 247.

73 See Duff v. Fisher, 15 Cal. 379; Gagliardo v. Hoberlin, 18 Cal. 306; Green v. Butler, 26 Cal. 599; Allen v. Fennon, 27 Cal. 68; Harris v. San Francisco, S. R. Co., 41 Cal. 393, 404; Wetzstein v. Largey (Mont.), 70 Pac. 717.

74 Cal. Code Civ. Proc., § 939, subd. 1.

75 The cases in which this rule has been declared and applied are so numerous as to forbid their insertion; and the rule is too well understood to render the citation of general authority necessary.

on appeal from the judgment, or from an order made on motion for new trial.[76] Where the verdict of a jury, or the finding of the court, is based upon evidence in which there is a substantial conflict, this court will not set it aside on the ground that it is contrary to the evidence. The rule is not peculiar to this court; it is an established principle in the practice of all appellate courts.[77] But it is not to be inferred from this that the court will not discuss the facts. And, in practice, the court often not only discusses the facts, but, necessarily, to some extent, considers the effect of evidence, and even the contradictions and improbabilities in the testimony of witnesses, in order to arrive at a conclusion as to whether or not there is a substantial conflict. A record may so far discredit a witness as to deprive his testimony of all probative value, and warrant the supreme court in saying that it creates no substantial conflict as against unimpeached evidence.[78]

There is another numerous class of cases which appear, without careful consideration, to constitute exceptions to the general rule, but which are, in fact, such only in appearance. Where error is assigned, though the appellate court concede error, it is often necessary to examine the whole record, including the evidence, in order to determine if such error were prejudicial; and if satisfied that without the error the esult must have been the same, will hold it to have been without prejudice and refuse to reverse.[79] In these cases the investigation is, as in other

76 See ante, § 671.

77 Appeal of Piper, 32 Cal. 530, 538. The language here used requires considerable qualification. In several states the review of cases tried by the court, especially equity cases is virtually a trial de novo: See post, § 680.

78 See Lind v. Closs, 88 Cal. 6, 25 Pac. 972, where it was held that a verdict against the defendant to recover damages for a criminal assault upon a married woman will be set aside upon appeal as against evidence, where it appears that it was based on the testimony of the wife alone, under circumstances tending to throw discredit on her testimony, and all other testimony in the case, including uncontradicted evidence as to the actions and admissions of the wife, show it to be inherently improbable that violence was used; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Hamilton, 46 Cal. 540; People v. Brown, 47 Cal. 447; People v. Ardaga, 51 Cal. 371.

79 Davis v. Green, 122 Cal. 364, 55 Pac. 9; Douphiny v. Red Poll etc. Co., 123 Cal. 548, 56 Pac. 451. In the second case the court said:

instances above-mentioned, merely incidental, or preliminary, to a decision of a question of law. And in cases where it is urged that a verdict in a damage case is excessive, the point thus raised, resting essentially upon all the evidence in the case, requires an examination of the whole record for its determination. But even here, much is conceded to the superior opportunities of the trial court; and it is held that the appellate court should not interfere, unless the verdict be "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice on the part of the jury"[80] So, where a verdict has been directed, the appellate court must necessarily review the evidence in determining the question of law raised by the assignment of error.[81]

"The appellant claims error at the trial in admitting the testimony of Olmstead and Cutler in reference to the purchase by Olmstead of twenty-nine cords of wood from the Mosely brothers, and his sale of that wood to the defendant. The evidence was offered with a view to establish the alleged mistake of the defendant in using the five cords. It will be seen, however, from the above general statement of the case that if the evidence was immaterial it was not prejudicial to the appellant, for the respondent's case is made out without proof of the fact. The evidence of those witnesses is all that was offered on that subject. It did not, as we have seen, prove the mistake contended for. But as the respondent gets its judgment from the weakness of appellant's case and without proof of the alleged mistake, the error, if any, was not prejudicial." Such expressions are frequently seen in opinions of the supreme court and can mean nothing else except that the court has gone into a thorough examination of the facts to discover the effect, if any, of the error.

80 Howland v. Oakland Consolidated St. Ry. Co., 110 Cal. 513, 42 Pac. 983. To same effect, Aldrich v. Palmer, 24 Cal. 513; Wheaton v. North Beach R. R. Co., 36 Cal. 590. This subject more fully considered in the next section. In Aldrich v. Palmer, supra, the supreme court went into a general review of the evidence. The same is true of the case of Wheaton v. North Beach, etc. Co., and in the first case cited the court said: "The jury gave a verdict for ten thousand dollars, and it is claimed that this amount is excessive. While we might not, had the question rested with us, have awarded damages in so large an amount, yet we are unable, under all the circumstances, to say that the amount is so far excessive as to imply that it was awarded under the influence of passion or prejudice."

81 See Brady v. Kreuger, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083. But court will not weigh evidence further than to determine whether there was evidence to sustain the verdict without

An excellent statement of the principal rule is found in Lick v. Madden,[82] applying it to that case, thus: "Here is a direct and substantial conflict upon the precise point whether the attorney of the plaintiff was absent long enough to enable the clerk to make out and deliver both sets of papers. It may be, as claimed by the learned counsel for the appellant, that the finding of the court is contrary to the weight of this testimony, but it cannot be denied but that there was some evidence which sustains the finding. Of the credibility and weight of this evidence, the court below, acting as a jury, was the sole judge. To set aside his finding because we might have found the other way had we occupied his place, would be to substitute our judgment for his upon a question of fact, which, as this court has uniformly held, we are not allowed to do."

The rule has not been always stated by the courts with entire freedom from unwarranted qualification and ambiguity. But it is not difficult among the many more or less clear and felicitous expositions of it, to obtain an accurate idea of its purpose, extent and limitations.

What has been sometimes accepted as a distinct rule, but what is really another expression of the same rule in a different form, is the proposition that the appellate court will not weigh the evidence to determine where the preponderance lies, where there is some evidence on both sides, if there is enough on the prevailing side to support the verdict or other decision, without regard to that on the side of the losing party. In Hill v. Smith,[83] the court left room for the inference that a decision might be so clearly against the weight of evidence as to warrant a reversal on that ground, saying: "We are not very well satisfied with the verdict on this point, yet it is not so clearly against the evidence as to justify us in setting it aside." But such inference was entirely excluded by the language of the court in a subsequent case, where the court said: "We never disturb the verdict on the ground that it was not justified by

regard to the evidence of the adverse party: Weiss v. Evans, 13 S. Dak. 185, 82 N. W. 388; Walker v. McCaull, 13 S. Dak. 512, 83 N. W. 578; Merchants' Nat. Bank v. Stebbins, 15 S. Dak. 280, 89 N. W. 674.

82 36 Cal. 208, 213, 95 Am. Dec. 175.

83 32 Cal. 166.

the evidence, when there was a substantial conflict in the testimony, even though we may consider it to be greatly against the weight of evidence."[84]

Every true statement of the rule contains the adjective qualification. In order that a decision of fact may be exempt from disturbance for not being supported, on the ground that there is evidence on both sides, there must be substantial evidence on both sides; in other words, there must be a substantial conflict. And, although a finding by a jury or trial court will not be disturbed on the ground that it is not warranted by the evidence where there is presented a fair, reasonable ground for a difference of opinion, yet where the great current of the evidence is against the finding or verdict, and the appellate court is convinced that it is wrong, it will not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs where there is a substantial conflict of evidence.[85]

It is held by some courts that where all the material evidence at the trial consists of depositions, affidavits or other documentary evidence, the appellate court should take an original view of it, and weigh and measure it by the same standard and test that the trial court is required to apply, or as if the action arose in original proceedings in the appellate court.[86] But, though often urged to do so, the supreme court of California has persistently applied the general rule to such cases.[87] It

84 Wilson v. Fitch, 41 Cal. 363, 385.

85 Field v. Shorb, 99 Cal. 661, 34 Pac. 504.

86 See ante, § 411.

87 See Knox v. Moses, 104 Cal. 502, 38 Pac. 318. In this case the court said: "This action was tried and submitted upon testimony taken in two other cases, and it is now insisted that for such reason this court should take a first and original view of the evidence introduced, and weigh and measure it by the same standard and test that the trial court was required to apply. In other words, it is contended that the evidence should be examined and gauged the same as though the question here presented arose by an original proceeding pending in this court. This position of appellant is unsound. The court has declared the rule contrary to the principle sought to be invoked: Reay v. Butler, 95 Cal. 215, 30 Pac. 208; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433.

has often been argued, and was said by the court in one case,[88] that the reason of the rule is that the trial court has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain where the witnesses do not appear personally in court. The refusal of the supreme court to relax the rule in the class of cases above mentioned is based upon a broader ground than that just stated, and was set forth by McFarland, J., in the opinion in Reay v. Butler.[89] After reviewing prior decisions and adverting to contentions of counsel, the learned associate justice said: "But it may well be argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, and the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. Indeed, there are numerous cases in which the decisions of this court have been directly contrary to the doctrine contended for by appellant." For the reason given in the above quotation, the California court refuses to recognize any exception to the general rule, in cases where there has been a trial before one judge or court, and a motion for new trial heard before another,[90] though such an exception is made in some jurisdictions.[91]

88 Wilson v. Cross, 33 Cal. 60. This case finds unqualified support in Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863. The latter case was not referred to in the opinion in Reay v. Butler, 95 Cal. 206, 30 Pac. 208. And it was held in Reynolds v. Snow, 67 Cal. 498, 8 Pac. 27, that the rule did not apply when the evidence consisted entirely of ballots, photographic copies of which are before the court on appeal.

89 95 Cal. 206, 214, 30 Pac. 208. See, also, Parrott v. Floyd, 54 Cal. 535, where, notwithstanding that the evidence consisted entirely of affidavits, the general rule was applied: Blum v. Sunol, 63 Cal. 341.

90 See Bander v. Tyrrel, 59 Cal. 99; Altschul v. Doyle, 48 Cal. 535; Macy v. Davila, 48 Cal. 647; Blood v. La Serena Land etc. Co., 134 Cal. 361, 66 Pac. 317. In the last case the court said: "It was

91 See post, §§ 681, 682.

It is conceded, however, even in California, that the appellate court will look a little more closely into evidence when it consists entirely of depositions, or affidavits, or notes of former testimony.[92]

The rule against decisions of fact is so strictly adhered to by the supreme court of California, that it refuses to determine whether findings consisting entirely of evidence support the judgment.[93]

held in Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791, that on the hearing of a motion for a new trial by a judge who had not tried the case, he stands in the shoes of the former judge, and has the same power, and is charged with the same duty, as if the motion had come before the former judge. The same rule must apply, and for the same reasons, where a judge decides the case on the evidence submitted to him, though taken before another judge. And we think the ordinary presumption in favor of the decision of the trial court prevails, just the same as where the trial judge has the witness before him. The rule as to when this court will interfere to set aside a finding of fact in the case of an alleged conflict in the evidence is, that it may rightly set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion: Frace v. Brown, 117 Cal. 324, 49 Pac. 213, and cases cited; Carter v. Lothian, 133 Cal. 451, 65 Pac. 962."

92 Reay v. Butler, 95 Cal. 206, 215, 30 Pac. 208.

93 Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799. In this case the court stated the rule and the reasons underlying it very fully, as follows: "The court has made no finding upon the issue of title presented by the pleadings, but has included in its findings certain evidence which was introduced at the trial. Neither has it found the probative facts from which the ultimate fact of title can be determined. It has been stated in several cases in this court that when the findings of the court below contain such probative facts that the ultimate fact in issue necessarily results therefrom, this court will make the deduction of such ultimate fact; but that, unless such ultimate fact necessarily follows from the facts found, the findings are insufficient, and the judgment must be reversed for want of findings. It has never been held, however, or even stated, that findings of the court below which consist either in whole or in part evidence presented at the trial, and do not purport to be probative facts involved in the issue, are a sufficient compliance with the requirements of the code. The jurisdiction of this court is appellate, and not original, and it is the function of a court of original jurisdiction to determine in the first instance whether the evidence offered in support of an issue is sufficient to sustain that issue. This court cannot pass upon that ques-

§ 679.—When rule not applicable—Review of evidence when mistake, misapprehension, passion, etc., of jury.

There is a class of exceptional or distinguishable cases to which the rule discussed in the next preceding section seems not to apply. The cases here referred to are those in which a reasonable presumption arises upon the verdict when compared with the balance of the record, that "there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice." The California Code of Civil Procedure was amended in 1874 by the insertion of a new section, containing the above provision.[94] The court, under the circumstances recited in the above quotation, may vacate the verdict of the jury and grant a new trial "on its own motion, without the application of either of the parties." The section further provides that: "The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section 661." It necessarily follows from the right of appeal being given that the action of the lower court may be reviewed in such cases. And it is obvious that, even though the trial judge should take no action, the appellate court would, on appeal from the judgment, taken within sixty days, upon a record containing the evidence, reverse the judgment and order a new trial, if the case came early within the terms of the statute. Indeed, the power

tion until after the trial court has determined it, and then only in a proceeding to set aside such determination. When an appeal from a judgment is heard upon the judgment-roll alone, the only question to be considered is, whether the findings of fact sustain the judgment. Whether the evidence is sufficient to sustain the findings cannot be considered upon such appeal, except in the single instance when it is brought here upon a bill of exceptions on an appeal taken within sixty days after the rendition of the judgment. In no case can this court determine whether the evidence, irrespective of findings, is sufficient to support the judgment; and when the findings are merely of evidence, this court cannot make the findings of fact from that evidence, which it was incumbent upon the trial court to make."

94 Cal. Code Civ. Proc., § 662.

of courts, both trial and appellate, to set aside judgments rendered upon verdicts so affected was frequently exercised, and its exercise sanctioned in California, anterior to any such statutory provision, and is exercised elsewhere. in the absence of such provision. A further discussion of the powers of the trial judge, and of the proper practice herein will be found in a preceding chapter.[95]

It is difficult to determine whether such a provision is an enlargement or a limitation of the jurisdiction. In California, prior to the adoption of the provision, it was frequently held that, notwithstanding that there was some conflict in the evidence, yet, if it appeared clearly that the verdict or decision was wrong upon the evidence, it would be set aside. In other words, that the question of the weight of evidence was addressed, in the first instance, to the discretion of the trial court; and its decision thereon would not be disturbed except for an abuse of discretion.[96]

It appears difficult to reconcile the code provision with the general rule previously discussed. The only theory upon which they may be reconciled is by treating the rule as to conflicting evidence as the general rule of decision, and the other a sort of qualification thereof, an abuse of discretion being, pro hac vice a sort of distinct error, without reference to the question of a conflict in the evidence. It has sometimes been supposed, and stated, that the abuse of discretion theory was applicable only where the appeal was from an order on motion for new trial. This idea is probably referable to the fact that in California prior to the adoption of the codes, the supreme court could not investigate the sufficiency of the evidence, except on appeal from such orders, and, as a consequence, such questions were never presented otherwise than in that shape. That there is no reason for limiting it to such appeals is obvious when it is considered that the fact that a decision is against the weight of

95 Ante, c. 20.

96 Phelps v. Union C. M. Co., 39 Cal. 410; Hall v. Bark Emily Banning, 33 Cal. 524; Pierce v. Scnaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419; Simpson v. Pacific Mut. L. Ins. Co., 44 Cal. 141; Hawkins v. Reichert, 28 Cal. 538; O'Brien v. Brady, 23 Cal. 243; Quinn v. Kenyon, 22 Cal. 82.

evidence is not and never has been a ground for an order by the appellate court for a new trial.

§ 680. Modifications of general rule in certain states.

The general rule limiting review in matters of fact has but little reference or bearing upon any other jurisdiction than that of the supreme court of California. Considerably greater latitude of review exists under the constitutional and statutory systems of certain states. In some of them the limitation is the same as in California in legal actions, while in equity cases, the evidence is examined and the appellate court reaches its own conclusions as to what the findings should be, regardless of those of the trial court.

In one or two states, the line of distinction is drawn between cases tried by the court and those tried by jury, the proceeding in the appellate court being virtually a trial de novo. To pursue and adequately develop the constitutional, statutory and adjudicated law in any detail, as it exists in such states, is obviously out of the question. Some of the most important features of the system of a few states are noticed in the note.[97]

97 In New Mexico, it appears that to warrant the supreme court in disturbing a finding of the lower court it is only necessary that it be clearly against the weight of the evidence: See Rush v. Fletcher (N. Mex.), 70 Pac. 559; Romero v. Coleman (N. Mex.), 70 Pac. 559. And where in a cause tried by the court without a jury, the court fails to find material facts, which, being considered, demonstrate that the decree rendered in the court below was manifestly wrong, the supreme court will consider such facts, to enable the court to arrive at a just conclusion: Millheiser v. Lang, 10 N. Mex. 99, 61 Pac. 111. In North Dakota constitutional and statutory provisions are found requiring a review of questions of fact as well as of law, upon appeal projected to that end. The review is in effect a trial de novo upon the record. The supreme court is without authority to retry where part of issues only were determined by lower court, in case tried without a jury under Revised Codes, section 5630: Mapes v. Metcalf, 10 N. Dak. 601, 88 N. W. 713. Section 5630, Compiled Laws of North Dakota, requires all evidence offered in actions tried by the court without a jury to be taken down with the objections thereto and rulings thereon. A party seeking a new trial sought it in the supreme court by bringing up all the evidence with the record proper. The supreme court would never reverse for mere errors in the admission or rejection of evidence, but tried the case de novo on the record.

§ 681. When no substantial conflict, sufficiency or insufficiency of evidence is a proper question for review.

There are many illustrations of the converse of the foregoing

In 1893 (Laws, 1893, c. 82, § 1) a slight change was made in the practice, but the system projected in the prior statute was not materially disturbed: See Nichols v. Stangler, 7 N. Dak. 107, 72 N. W. 1089, and Otto Gas Engine Works v. Kneer, 7 N. Dak. 195, 73 N. W. 87, for full explanation. In the latter case Wallin, J., delivering the opinion, said: "The statute was a sweeping innovation upon well-established procedure as it existed in all the code states; and, in the opinion of the writer, at least, it has power to be a disastrous experiment." Failure to specify the question of fact desired to be reviewed or to state that a trial de novo of the entire case is sought, will preclude a retrial of any fact within the issues: Farmers' etc. Bank v. Davis, 8 N. Dak. 83, 76 N. W. 998. Under the system, specifications of error in the statement and assignments of error in appellate court are required as in other cases: Nichols v. Stangler, 7 N. Dak. 102, 72 N. W. 1089. Under provisions of section 5630, Revised Codes it is not sufficient to insert the specifications in the notice of appeal without inserting them also in the statement of the case: Douglas v. Glazier, 9 N. Dak. 615, 84 N. W. 552. Supreme court is without authority to try the case anew unless the statement of the case embraces all the evidence: Littel v. Phinney, 10 N. Dak. 351, 87 N. W. 593; Geils v. Fluegel, 10 N. Dak. 211, 86 N. W. 712; Eakin v. Campbell, 10 N. Dak. 416, 87 N. W. 991; Teinen v. Lally, 10 N. Dak. 153, 86 N. W. 356. As to requirements and essentials of the record on appeals, see generally, Edmondson v. White, 8 N. Dak. 72, 76 N. W. 986; United States S. & L. Co. v. McLeod, 10 N. Dak. 111, 86 N. W. 110; Farmers' etc. Bank v. Davis, 8 N. Dak. 83, 76 N. W. 998; National Cash Reg. Co. v. Wilson, 9 N. Dak. 112, 81 N. W. 285. As to sufficiency of judge's certificate to statement, see Edwardson v. White, 8 N. Dak. 72, 76 N. W. 986; Kipp v. Angell, 10 N. Dak. 199, 86 N. W. 706; United States S. & L. Co. v. McLeod, 10 N. Dak. 111, 86 N. W. 110; Farmers' etc. Bank v. Davis, 8 N. Dak. 83, 76 N. W. 998. The statute applies only to cases tried in the lower court without a jury, and this holds good even though a jury be called and return a verdict advisory to the court in an equity case. In such case the appellate court does not review the facts: Peckham v. Van Bergen, 8 N. Dak. 595, 80 N. W. 759. If evidence evenly balanced, or nearly so, a doubtful scale will always turn in favor of the view adopted by trial court: Nichols v. Stangler, 7 N. Dak. 108, 72 N. W. 1089; Jasper v. Hagen, 4 N. Dak. 1, 58 N. W. 454. Court will not retry issues of fact where findings of fact waived below: Nichols v. Stangler, 7 N. Dak. 102, 72 N. W. 1089. In deciding an equity case it is the duty of the supreme court of Oregon, under section 543 of Hill's Annotated Laws, to reach its conclusions by original investigation, and the findings of the trial court are only advisory, though they may be persuasive:

rule; that is to say, where there is no substantial conflict the court will, upon proper presentation, deduce the proper decision resulting from the evidence found in the record, reversing the

Larch Mountain Investment Co. v. Garbade, 41 Or. 123, 68 Pac. 6. Under said statute it is the primary duty of the supreme court to try an equity case anew, and it is only for the purpose of resolving a doubt on conflicting evidence that the findings of the referee or the trial court are resorted to: Nessley v. Ladd, 29 Or. 354, 45 Pac. 904. Fact that trial court sees the witnesses and their manner of testifying, held immaterial: Wollenberg v. Minard, 37 Or. 621, 62 Pac. 532. Evidence received outside issues not considered, though no exception: Blagen v. Smith, 34 Or. 394, 56 Pac. 292. For South Dakota practice under former statutory system, see Greenleaf v. Greenleaf, 6 S. Dak. 348, 61 N. W. 42; Reagan v. McKibben, 11 S. Dak. 270, 76 N. W. 943. Under system subsequent to recent amendments, see Anderson v. Medbury (S. Dak.), 92 N. W. 1089. In Utah, where the supreme court reviews the facts in equity cases, the rule is that where there is a conflict in the testimony, or it is evenly balanced, and the findings of the trial court thereon are sustained by the evidence, such findings will not be disturbed on appeal, but when the testimony preponderates on one side or the other in such a way as to convince the appellate court that the court below has erred, the judgment will be reversed: Wilson v. Cunningham, 24 Utah, 167, 67 Pac. 118. To same effect, Harter v. Sorenson, 24 Utah, 342, 67 Pac. 1062; Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762. See, also, Bunker Hill Min. Co. v. Pascoe, 24 Utah, 60, 66 Pac. 574; Johnston v. Meaghr, 14 Utah, 426, 47 Pac. 861; Nelson v. S. P. Co., 15 Utah, 325, 49 Pac. 644; Center Creek Water etc. Co. v. Thomas, 19 Utah, 360, 57 Pac. 30; Dwyer v. Salt Lake City Copper Mfg. Co., 14 Utah, 339, 47 Pac. 311; North Point Consol. Irr. Co. v. Utah & S. L. Canal Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168; McKay v. Farr, 15 Utah, 261, 49 Pac. 649; Salt Lake City v. Colladge, 13 Utah, 522, 45 Pac. 891. With foregoing cases compare Klopensteine v. Hays, 20 Utah, 45, 57 Pac. 712; Sidney Stevens Implement Co. v. South Ogden Land etc. Co., 20 Utah, 267, 58 Pac. 843; Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512; Cavanaugh v. Salisbury, 22 Utah, 465, 63 Pac. 39; Elliot v. Whitmore, 23 Utah, 70, 65 Pac. 70, holding that, although the supreme court has power, under constitution, article 8, section 9, to review facts in an equity case, unless the evidence is clearly insufficient to sustain the findings they will not be disturbed. On appeal in an equity case, the court will review evidence improperly excluded at the trial below, where the same is fully set out in the bill of exceptions: Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512. When, in a cause in equity, an appeal was taken within sixty days after the filing of the decree, the appellate court has power to go behind the findings of fact and judgment, and consider the evidence, for the purpose of determining the

judgment if it be founded upon insufficient evidence, or has been against sufficient evidence.[98]

§ 682. No review of facts where decision is an inference from circumstances.

To the rule that the appellate court will reverse in the absence of evidence to support the decision there is an exception in cases where the ultimate fact found by the jury or decided by the

case: Bacon v. Thornton, 16 Utah, 138, 51 Pac. 153. In Washington, as in North Dakota, the supreme court reviews all the facts in all cases tried without a jury by the court. And the court may weigh the evidence in support of the findings of fact, and is not limited to the determination of whether there is any substantial evidence in their support: Furth v. Baxter, 24 Wash. 608, 64 Pac. 798; 2 Ball. Ann. Codes and Stats., § 6250. See, also, Allen v. Swerdfiger, 14 Wash. 461 44 Pac. 894; Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677, overruled; Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225. But a finding by the trial court in an equity case will not be disturbed if reasonably supported by the evidence: Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677. Error in the admission of evidence is not of itself sufficient to warrant a reversal in an equity case: Roher v. Snyder, 29 Wash. 199, 69 Pac. 748. Under Ball. Ann. Codes & Stats., § 6535, providing that the supreme court shall hear all causes on the merits, and consider all amendments which could have been made as made, the complaint will be treated as amended, when it is necessary to do justice, and when to do so will not deprive either party of a substantial right: Allend v. Spokane Falls etc. Ry. Co., 21 Wash. 324, 58 Pac. 244. Where the court holds that plaintiff's evidence is insufficient to sustain the allegations of the complaint, and directs a nonsuit, no other finding is necessary in order that the cause may be tried de novo on appeal: Murray v. Shoudy, 13 Wash. 33, 42 Pac. 631. Where documentary evidence is erroneously rejected by the trial court, but is marked for identification, and made a part of the record on appeal, it will be considered on a de novo trial in the appellate court: Dormitzer v. German Savings etc. Soc., 23 Wash. 132, 62. Pac. 862. Although a trial court may have abused its discretion in reopening a case and admitting additional testimony after it had been closed, the supreme court would not, in an equity case which it tries de novo, do more than disregard such evidence, and would determine the case on what was properly in the record: Washougal etc. Transportation Co. v. Dalles etc. Nav. Co., 27 Wash. 490, 68 Pac. 74.

98 Full citation of authorities would be a presentation of legal propositions announced by appellate courts, and of course need not be attempted.

court is an inference from circumstances, a process which it is held the appellate court cannot pursue; and it will refuse to examine as to the sufficiency of the evidence for that reason. Thus in McKeever v. Market Street R. R. Co.,[99] the court refused to disturb an order denying a new trial saying: "The testimony consists of a series of circumstances, from which the jury are to find on the issue of negligence. The jury under such circumstances are to make such inferences from the testimony as legitimately and justly follow, on which to base their verdict. They are not only to find the facts, but the inferences from them. The evidence is not of the character which presents a mere question of law." This exception is most frequently found to operate in actions where the question of negligence is involved, in which it by no means necessarily follows, that, because there is no conflict in the testimony, the court is to decide the issue between the parties as a question of law. The fact of negligence is seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as on inference of fact from several facts and circumstances disclosed by, the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases, the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Usually, what constitutes negligence is determined by an inference of the mind from the facts and circumstances of the case, and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same.[100]

But even in cases of negligence, the facts may be so clear and decisive that the inference of negligence is irresistible and in every such case it is the duty of the judge to decide. Courts

99 59 Cal. 294, 300. See, also, Bausman v. Cameron, 26 Wash. 352, 67 Pac. 70.

100 See Fernandes v. Sacramento City Ry. Co., 52 Cal. 45; Ireland v. Oswego etc. R. Co., 13 N. Y. 533.

must, of course, take notice of that which is matter of common knowledge and experience.[101]

The exception, however, is rarely, if ever, allowed to operate in other than cases in which there are well-established reasons for its application. The relation of the circumstances to the fact to be inferred, whether close or remote, will sometimes control. In National Gold Bank v. McDonald,[102] the court said: "In the case at bar, the court finds as a fact that the defendant presented the check for deposit as cash, and that the plaintiff 'received it as such cash deposit, and entered the amount of the same to the credit of the defendant as cash in the said deposit book.' On the motion for a new trial one of the grounds specified and relied upon was that this finding was not justified by the evidence. It is not pretended that there was any evidence of an express agreement to the effect that the check was offered and received as a cash deposit; and the court must have reached that conclusion, as a deduction from the facts above stated. But from the reasons already given, we think the court erred in the deduction, and that the finding is not supported by the evidence."

§ 683. Limitation by concession to discretion of trial court.

Discretion enters, more or less, into the decision of every question of fact, inferable from other facts, and, sometimes, "abuse of discretion" is a term used to describe a decision so clearly against the weight of evidence as to justify a reversal. But discretion oftener, and more largely, enters into judicial action in the making of orders and rulings anterior to the final decision than in rendering the latter. Consequently the question of whether discretion has been properly exercised usually comes up for review on appeals from orders, where there was no conflict of evidence, or was no dispute with reference to what constituted the basis for the court's action.

The rule that the exercise of discretion by the lower court will not be disturbed, except in cases of its abuse, like some

101 Fernandes v. Sacramento etc. Ry. Co., 52 Cal. 45; Fleming v. Western Pac. R. R. Co., 49 Cal. 253; Deville v. Southern Pac. R. R. Co., 50 Cal. 383; Gaynor v. Old Colony R. R. Co., 100 Mass. 21, 97 Am. Dec. 96.

102 51 Cal. 64, 71, 21 Am. Rep. 697.

other questions discussed under this head, has been declared and followed in a large number of cases.[103] Just what amounts to an abuse cannot be stated in the form of a legal proposition, notwithstanding that discretion has its legal limitations. No more lucid exposition of these limitations may be found than that by Justice Sanderson in Baily v. Taaffe,[104] as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." It will be seen, however, how far it falls short as a certain guide to any case subsequently arising.

In order that an order which appears to have done injustice to a party may be upheld, lest the discretionary power of the lower court be invaded, it must appear that it was made in the exercise of discretionary power. Thus where it appeared from the record that the court refused to allow a witness to be recalled for further examination, and in the opinion of the appellate court it should have been permitted, and the refusal was due to an erroneous supposition that it had no discretion to permit it, the judgment was reversed and a new trial ordered.[105] And

103 This general rule, like some of the others already stated, is too well understood, and has been too frequently decided to warrant or to require citation of authority.

104 29 Cal. 423.

105 Tyler v. Healey, 51 Cal. 191.

in Heinlen v. Cross,[106] a writ of mandate was granted to compel a judge of the superior court to hear an application for an injunction which he had dismissed, upon the erroneous supposition that he had no power to grant it, pending an appeal which had been taken in the case. Under this head may be restated the rule that unless an order granting a new trial has been made upon some legal proposition, which may be considered in itself, a stronger showing is required to justify the supreme court in interfering with it than with an order refusing a new trial.[107] The following is a fuller and clearer expression of the rule: "Orders of trial courts granting new trials are not often disturbed, and yet, when it appears that such an order was granted through misapprehension of the law, it should be reversed as readily as an order refusing a new trial."[108] No very satisfactory explanation for this rule can be found in the California reports, though the rule itself has been often announced. Probably the most important, if not the only, underlying reason is that in granting a new trial the trial court exercises a discretion which the appellate court will not invade except upon very clear grounds, whereas a refusal to grant a new trial merely presents a case of nonaction. But, of course, this explanation would not hold true where the grounds of the motion which was denied called for the exercise of discretion in reviewing and passing upon them.[109]

106 63 Cal. 44.

107 See Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; ante, chapter 19. The rule that the granting of a new trial for insufficiency of the evidence will only be reversed where there has been a manifest abuse of discretion was held inapplicable where the hearing of the motion was before a judge who did not preside at the trial: Sands v. Cruikshank, 15 S. Dak. 142, 87 N. W. 589.

108 Schramm v. Southern Pac. Co., 87 Cal. 425, 25 Pac. 481; Dunkle v. Spokane Falls etc. Ry. Co., 20 Wash. 254, 55 Pac. 51. For a case of abuse of discretion in granting a new trial on ground of newly discovered evidence, see Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157. Order granting new trial because of abuse of discretion in Lowe v. Long, 5 Idaho, 122, 47 Pac. 93.

109 See Tibbet v. Tom Sue, 125 Cal. 544, 58 Pac. 160; Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Wormouth v. Gardner, 105 Cal. 149, 38 Pac. 646.

§ 684. Limitations resting upon presumptions in favor of judgment or order appealed from.

On appeal the presumption of regularity and correctness in the judgment or order appealed from, and in the steps and proceedings leading up to it, in some of its varied phases, meet the appellant at every point. And, where the recitals in a judgment, read together, are as susceptible of a construction which will sustain the judgment as of a construction which will defeat it, the presumption in favor of the judgment requires that the former construction be adopted.[110]

The appellant must make it affirmatively appear by the record that the judgment or order has been affected by error, irregularity or abuse of discretion, in the lower court. To this end, it is incumbent upon him assuming that he has laid the proper foundations and saved exceptions during the proceedings in the lower court, to present in the record as complete and detailed a history of the proceedings as is necessary to overcome the aforesaid presumption. If sufficient does not appear for his purpose in the judgment-roll, and it seldom does, he must resort to a bill of exceptions or statement for that purpose.[111]

110 Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811. In this case it was held that upon an appeal from a judgment on the judgment-roll alone, where the record shows that the cause was tried by the court upon issues joined, and the recitals in the judgment show that the cause was tried upon the papers and records on file, together with the statements made by the respective parties, it will be presumed that the judgment was sustained by the statements and admissions of the parties, and the fact that it further recites that there was no evidence offered is not sufficient to overcome such presumption. To same effect, Byers v. Rothchild, 11 Wash. 296, 39 Pac. 688.

111 See Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Reed v. Cross, 116 Cal. 473, 48 Pac. 491; Orange Growers' Bank v. Duncan, 133 Cal. 254, 65 Pac. 469; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936; Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Brind v. Gregory, 120 Cal. 640, 53 Pac. 25; Barber v. Mulford, 117 Cal. 356, 49 Pac. 206; Thompson v. Alford, 135 Cal. 52, 66 Pac. 983; Cheda v. Skinner (Ariz.), 57 Pac. 64; Rumney Land etc. Co. v. Detroit etc. Cattle Co., 19 Mont. 557, 49 Pac. 395; Wood v. Gleim, 19 Mont. 22, 47 Pac. 5; Peers v. Reed, 23 Nev. 404, 48 Pac. 897; Reinhart v. Company D, First Brigade, Nevada National Guard, 23 Nev. 369, 47 Pac. 979; De Lendrecie v. Peck, 1 N.

What use can be made of the statement or bill will be determined when the appeal from the judgment is reviewed upon its merits. The insufficiency of the evidence to justify the decision cannot be considered upon such an appeal taken more than sixty days after entry of the judgment, and the use of the statement will be limited at the hearing to such matters as are authorized to be determined upon the appeal.[112] Reference may be had, however, on motion for new trial, to the pleadings in a case for the purpose of ascertaining the issues and determining the correctness of the rulings, and it is to be presumed upon appeal that such reference was made, and the fact that it was made need not be presented by a bill of exceptions.[113]

On the general proposition that the presumptions in favor of the conclusion of the lower court must be thus overcome, a vast array of authorities might be cited. Indeed, the presumption is in some way referred to in a large percentage of cases

Dak. 422, 48 N. W. 342; Thiset v. Strong, 7 N. Dak. 565, 75 N. W. 922; Farrel v. Oregon Gold Min. Co., 31 Or. 463, 49 Pac. 876; Tatum v. Massie, 29 Or. 140, 44 Pac. 494; O'Connor v. Van Hoy, 29 Or. 505, 45 Pac. 762; Richardson & Boynton Co. v. Dunlap, 26 Or. 270, 38 Pac. 1; Merchants' Bank v. McKinney, 1 S. Dak. 78, 45 N. W. 203; Kehoe v. Hanson, 6 S. Dak. 322, 60 N. W. 31; Merchants' Nat. Bank v. McKinney, 6 S. Dak. 58, 60 N. W. 162; Foley-Wadsworth Co. v. Porteous, 7 S. Dak. 34, 63 N. W. 155; Hecla Gold Min. Co. v. Gisborn, 21 Utah, 68, 59 Pac. 518; Casey v. Oakes, 17 Wash. 409, 50 Pac. 53; Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756. Any matter dehors the record, relied on to destroy the presumptions in favor of the judgment, upon an appeal therefrom, must be embodied in a bill of exceptions; and if any matters could have been presented to the court below which would have authorized the judgment, it will be presumed that they were presented if the record does not show the contrary: Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411. In the absence of a statement of facts or bill of exceptions showing the circumstances under which a judgment is rendered, the supreme court will not review the action of the trial court in entering judgment in excess of the verdict of a jury: Carpenter v. Barry, 28 Wash. 255, 66 Pac. 393. The appellant is responsible for all deficiencies in the bill of exceptions; and where it is unintelligible or conflicting, it will be interpreted against him, and in support of the judgment: Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280.

112 Wall v. Mines, 128 Cal. 136, 60 Pac. 682.

113 Southern Pac. R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

which reach appellate tribunals. The operation of this presumption is somewhat modified on appeal from a judgment of nonsuit. In such case, the presumptions upon appeal are not strong for the correctness of the ruling; but the evidence must be construed as strongly as possible the other way; since the plaintiff is entitled to a judgment upon the merits, if there is any substantial evidence in his favor.[114] But an objection to evidence is a mere reason offered for its exclusion, and, where the party appealing complains of its exclusion, if the court decided correctly in rejecting the testimony for any other reason which might have been urged, its ruling must stand upon appeal. In such case, it is not important whether the best objection was made, or whether any objection was made. But where testimony is admitted against objection, the party complaining of such ruling must confine himself to objections specifically taken at the trial and stated in the record—the distinction being between the case of a party seeking to reverse a judgment, and that of a party resisting the attempt, and springing from the rule that all intendments run in support of the judgment.[115] And it has been held that, if the record on appeal does not purport to contain all the evidence, an erroneous ruling in the admission of evidence cannot be held prejudicial on appeal.[116] It was also held that an appellant who relies upon evidence outside the issues must make it affirmatively appear that it was received without objection.[117]

114 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

115 Davey v. Southern Pac. Co., 116 Cal. 325, 48 Pac. 117.

116 Brown v. Casey, 80 Cal. 504, 22 Pac. 257. The decision is evidently unsound. Numerous cases could be cited. For instance, in Santa Maria v. Connolly, 79 Cal. 517, 21 Pac. 1093, it was held that the rule that every intendment is in favor of the order of the court below granting a new trial is not applicable, where the question presented is purely one of law, and this court is satisfied that an error has been committed. See, also, Goodale Lumber Co. v. Shaw, 41 Or. 544, 69 Pac. 546, holding that where it affirmatively appears that the bill of exceptions contains all the testimony applicable to the decision of a point, and all that was considered by the trial judge in his ruling, it is sufficient to secure a consideration by the appellate court, though not all the testimony on other points is before the court. To same effect, Wilson v. Atkinson, 68 Cal. 590, 10 Pac. 203.

117 Riverside Water Co. v. Gage, 108 Cal. 240, 141 Pac. 299.

The scope and effect of the presumption was thus stated by Wallace, C. J., in Doyle v. Franklin:[118] "It is hardly necessary to refer, in this connection, to the settled rule that all intendments here, consistent with the record as presented, must be taken in support of the proceedings of the court below, and that the burden is upon the appellant to make the alleged error manifest." In another case, the same learned justice expressed the same idea thus: "The rule is familiar that a party complaining of alleged error committed to his injury must point it out—error will not be intended, but the presumption indulged is that the proceedings below were correct, so far as such presumption is not overcome by the record." [119]

The most frequent occasions for the application of the rule is where the court presumes in favor of the sufficiency of the evidence to support a finding, the evidence not appearing in the record.[120]

118 48 Cal. 537, 540.

119 Moore v. Massini, 43 Cal. 489, 491.

120 See Thompson v. Weeks, 26 Cal. 51, 58; Grewell v. Henderson, 7 Cal. 291; Freeman v. Marshal, 137 Cal. 159, 69 Pac. 986; Schuur v. Rodenbach, 133 Cal. 85, 65 Pac. 298; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Woodmen of the World v. Rutledge, 133 Cl. 640, 65 Pac. 1105; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; Rowe v. Blake, 112 Cal. 637, 44 Pac. 1084; People v. Creegan, 121 Cal. 554, 53 Pac. 1082; Redlands etc. Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; Estate of Kelly, 63 Cal. 106; Beach v. Spokane Ranch etc. Co., 25 Mont. 379, 65 Pac. 111; Sadler v. State, 23 Nev. 141, 43 Pac. 915; Lincoln-Lucky & Lee Min. Co. v. Hendry, 9 N. Mex. 149, 50 Pac. 330; Witt v. Cuenod, 9 N. Mex. 143, 50 Pac. 328; Liebe v. Nicolai, 30 Or. 364, 48 Pac. 172; Tatum v. Massie, 29 Or. 140, 44 Pac. 494; State v. Colestock, 41 Or. 9, 67 Pac. 418; Adkins v. Monmouth, 41 Or. 266, 68 Pac. 737; United States Mort. Co. v. Marquam, 41 Or. 391, 69 Pac. 37, 41; Advance Thresher Co. v. Esteb, 41 Or. 469, 69 Pac. 447, case of directed verdicts; Blackman v. Hot Springs (City of), 14 S. Dak. 497, 85 N. W. 996; Adams v. Deyette, 5 S. Dak. 418, 49 Am. St. Rep. 887, 59 N. W. 214; Hecla Gold Min. Co. v. Gisborn, 21 Utah, 68, 59 Pac. 518; Culmer v. Caine, 22 Utah, 216, 61 Pac. 1008; Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374; Thacker, Wood & Co. v. Mallory, 27 Wash. 670, 68 Pac. 199; In re Bernier's Estate, 17 Wash. 689, 50 Pac. 495. Where appellant, by incorporating in the bill of exceptions the evidence introduced prior to the overruling of his motion for a nonsuit, brings up for review such ruling, and error appears

The general rule where error is urged for the exclusion of evidence requires the party taking the exception to clearly show, by the record, that the testimony was relevant to the issue, and not merely that it might have been. In Cohn v. Mulford,[121] the defendant (appellant) had offered to prove that a sale and transfer of a stock of goods was fraudulent, by evidence of a similar transaction about a year prior thereto. In passing upon the point, the supreme court said: "This evidence was rejected; and the propriety of its exclusion is the point before us. We do not see the materiality of the testimony, and no explanation was given to show its relevancy. It is not even proposed to show that this first sale was fraudulent; and even then, some authorities held that the evidence would be inadmissible; this rule that distinct frauds may be shown being limited to such frauds as were contemporaneous, or, at most, nearly so, and not embracing dealings so remote in point of time. The error imputed must clearly appear when that error consists in the exclusion of testimony. Upon the face of the exception, it must appear, not that possibly the proof might have been relevant, but that it clearly was." Nor upon appeal from the judgment, on the judgment-roll alone, will it be presumed that there was any evidence upon points in respect of which there is no finding.[122] Where, however, the trial court gives as its reason for not making findings upon material issues presented by an affirmative defense, that such find-

therein, there is no presumption that the deficiency in appellee's evidence was rendered harmless by the evidence which appellant afterward introduced, since it was the duty of the appellee to include in the bill of exceptions such portions of the evidence given by appellant, if any, tending to supply such deficiency: Cleveland Oil etc. Mfg. Co. v. Norwich Union Fire Ins. Soc., 34 Or. 228, 55 Pac. 435. Though the evidence not brought up, yet if findings in irreconcilable conflict, the decree cannot be sustained: Kountz v. Kountz, 15 S. Dak. 66, 87 N. W. 523. Presumption in favor of direction of verdict strong against party against whom verdict directed: Coldwell v. Maxfield, 7 S. Dak. 361, 64 N. W. 166.

121 15 Cal. 51, 52.

122 Greer v. Greer, 135 Cal. 121, 67 Pac. 20; Edelman v. McDonnell, 126 Cal. 210, 58 Pac. 528; Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 21; Hockstein v. Berghausen, 123 Cal. 681, 56 Pac. 547; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098.

ings were immaterial, it will be presumed on appeal from the judgment that evidence was introduced at the trial sufficient to support the allegations of the answer, and the failure to find thereon is ground for reversal of the judgment.[123]

The presumption that the court instructed the jury fully and correctly upon every material issue will prevail, unless the instructions are presented in the record.[124] And in the absence of the evidence, a finding which may possibly be construed either as inconsistent or as consistent with the pleadings, the other findings, and the judgment, cannot, upon either construction, furnish ground for reversal of the judgment.[125]

So far is this presumption indulged, that where an improper remark or suggestion has been made by the judge or by counsel, to, or in, the presence of the jury, it will be presumed, in the absence of the instructions from the record, that the jury were finally admonished or instructed with reference thereto. Thus, where remarks were made by the prosecuting attorney in a criminal case, alleged to have had a tendency to prejudice the jury against the defendant, and the instructions were not contained in the record, the court said: "We are bound to presume that the error, if any, was cured by the instructions afterward given by the court."[126] And the same presumption prevails where improper remarks are shown to have been made by counsel during the trial, in the presence of the jury, in a civil case, the instructions not appearing in the record.[127] And, where

123 Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203.

124 Searle v. Emerson, 25 Cal. 294; Garrison v. McGlackley, 38 Cal. 78; Tully v. Harloe, 35 Cal. 302, 310; 95 Am. Dec. 102; Hall v. Dowling, 18 Cal. 619; More v. Finger, 128 Cal. 313, 60 Pac. 933; Hagarty v. Strong, 10 S. Dak. 585, 74 N. W. 1037. It must be presumed upon appeal, where additional instructions were given which are not embodied in the record, that under such instructions, taken with those given and refused, the law of the case was properly presented to the jury: Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. Where all the evidence is not contained in the record, it will be presumed that facts assumed in an instruction were either admitted or conclusively proven at the trial: Crossen v. Gransly (Or), 70 Pac. 906.

125 Machado v. Kinney, 135 Cal. 354, 67 Pac. 331.

126 People v. Galvin, 9 Cal. 116.

127 Clark v. Fast, 128 Cal. 422, 61 Pac. 72; Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305. See, also, Shoemaker v. Lumber and Shingle

no motion to strike out, nor anything else appears to the contrary, it will be presumed that a promise to show the relevancy of evidence, which a party has offered, and which has been admitted, was kept, and that its relevancy was subsequently shown.[128]

Where the instructions appear in the record, and are claimed to be erroneous, such claim will be of no avail in the absence of the evidence, unless erroneous in every conceivable state of the evidence. This rule was established and very clearly stated at an early date in California. In People v. McCauley,[129]

Mill Co., 27 Wash. 637, 68 Pac. 380; Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

128 People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

129 1 Cal. 379, 386. See, also, Hinkle v. San Francisco etc. R. R. Co., 55 Cal. 627, 632; People v. Whitney, 53 Cal. 421; People v. Best, 39 Cal. 691; Beckman v. McKay, 14 Cal. 251; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929; O'Connor v. Southern Pacific R. R. Co., 122 Cal. 681, 55 Pac. 688; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577; People v. Cummings, 113 Cal. 88, 45 Pac. 184. In O'Connor v. Southern Pac. R. R. Co., supra, the court said: "As a matter of law, this court cannot say that the facts set out in finding 1, under the conditions there pictured, may not have caused damage to defendant's property, as declared by finding 2. The court has declared that damage did result from the acts done under the conditions described in finding 1, and without the evidence before us it is impossible for this court to gainsay that declaration. The test would seem to be that if under any conceivable state of facts these acts might result in damage to plaintiff's property, then, in the absence of the evidence, such a state of facts must be assumed to have been shown at the trial of the case. By finding 1 plaintiff has the use of thirty-one feet of the street between the railroad track and his lot. Less the sidewalk, and in the absence of the railroad track, he would have the use of seventy-two feet. As matter of law, the court cannot say that thirty-one feet of this street will answer all the legitimate uses to which it might be put by plaintiff, an abutting owner, any more than it can say that ten feet would be amply sufficient for all his legitimate uses." And in Gould v. Eaton, supra, the court said: "The present appeal is by the defendants from that portion of the judgment which enjoins them from diverting to lands not riparian to the creek any of the waters naturally flowing in its channel, and from preventing or interfering with the flow directly back into the stream from the mouth of the tunnel constructed by them of one and forty-three hundredths inches of water, measured under

where the instructions and exceptions thereto were presented in the record, but not the evidence, the court said: "The last objection urged against the legality of the proceedings at the trial respects the charge of the judge to the jury. Several instructions were given by him, which were excepted to by the defendant's counsel. These instructions are returned on this appeal, but no portion of the testimony given to the jury is returned. The correctness or incorrectness of the charge to the jury cannot be determined, without the court having before it the testimony from which alone can be seen the applicability of the charge. Instructions are always given with reference to the facts proved to the jury, and an instruction that would be perfectly sound in one case, might be unsound in another. The propositions laid down by the court are all correct in certain cases; whether they fitted this case, cannot be ascertained from the record. If the appellant desired to show that they were incorrect, he should have spread upon the record the testimony or the facts in relation to which the law was laid down by the court."

But the presumption will not prevail where an instruction given is such that no conceivable state of the evidence would justify it; and in such case, the absence of the evidence from the record, will not stand in the way of a reversal. The rule was thus stated in People v. Levison:[130] "It is true, there is no statement in this case. But when the instructions are erroneous under any and every state of facts, then this court will review them. For it follows as necessarily, in such a case, that the court erred to the prejudice of the defendant when

a four-inch pressure. The court found that this amount of water was abstracted and diverted from the channel of the stream by reason of the tunnel constructed by the defendants, and the appeal is directly from the judgment upon the judgment-roll without any bill of exceptions. The finding by the court of the amount of water diverted by means of the tunnel cannot be questioned by reason of the statement therein of the mode by which this amount can be ascertained. The evidence before the court by which it determined that the loss could thus be ascertained is not before us, and it must be assumed that it was of a satisfactory character, and the conclusion of the court thereon must be accepted by us as correct."

130 16 Cal. 99, 101, 76 Am. Dec. 505. See, also, People v. Dick, 32 Cal. 213; People v. King, 27 Cal. 514, 87 Am. Dec. 95.

there is no statement, as when one exists. If, however, the instructions may be correct under any supposed state of facts, the appellant must show affirmative error, we presume in favor of the judgment below, and will not reverse the judgment when no statement appears." In such instances, the court does not actually decide upon matters, aliunde the record, but obtains a correct idea of the general nature of the case from the record as it stands, even without the evidence, and upon the information thus obtained, judges whether, upon any possible state of evidence, legally admissible, the instruction complained of can be upheld. Thus, in People v. Dick,[131] the court, after stating the general rule, said: "But it is not in all cases necessary, in order to ascertain that a fatal error has been committed, that the evidence should be before the court of review. If the action of the court, of which complaint is made, be manifestly erroneous under any and every conceivable state of facts, or under the facts and circumstances of the case as they seem to have been assumed by the court that tried the cause, this court will not hesitate to review such action, notwithstanding the evidence may not be brought before us." The fact that an instruction was given will, in some such cases, be held to warrant an inference that evidence must have been given on the

131 32 Cal. 213. An instance of such an instruction is found in People v. Podilla, 42 Cal. 535, 540. See, also, Hardy v. Hohl, 11 Wash. 1, 39 Pac. 277; Hogan v. Peterson, 8 Wyo. 549, 59 Pac. 162. The refusal to give a requested charge will not be adjudged error where the record does not contain the instructions given, since it will be presumed that they covered the requested charge: Flint v. Nelson, 10 Utah, 261, 37 Pac. 479. Where the bill of exceptions fails to show that certain instructions complained of were given, or they were all which were given, such instructions cannot be considered on appeal: Hogan v. Peterson, 8 Wyo. 549, 59 Pac. 162. Where the record on appeal presents only a portion of the charge given on the court's own motion, it will be presumed that, as an entirety such charge covered everything contained in the instructions offered and refused: Kolbe v. Harrington, 15 S. Dak. 263, 88 N. W. 572. Where the record on appeal presents only a portion of the charge given on the court's own motion, it will be presumed on appeal that, as an entirety, such charge covered everything properly contained in the instructions offered and refused: Kolbe v. Harrington, 15 S. Dak. 263, 88 N. W. 572. Where the record fails to disclose what instructions were in fact given, the court cannot review the refusal to give those which were requested: Garr v. Cranney (Utah), 70 Pac. 853.

subject to which the instruction relates, and the instruction being fundamentally erroneous, the next step in the process of reasoning will be taken—namely, that no conceivable facts could have been legally established which warranted the instruction. Thus, where the court, in a homicide case, erroneously defined murder, in the second degree, the court said: "We must assume, from the fact that the court instructed the jury in relation to murder in the second degree, that there was some evidence in the case requiring an instruction on that point; but, as the instruction is not, and cannot, in any conceivable state of the evidence be, a correct definition of murder in the second degree, we cannot say that the error was not productive of an injury to the defendant." [132]

In case of alleged error for refusal to instruct, the general rule is the same. Thus, in Brown v. Kentfield,[133] the court said: "Certain instructions requested by the plaintiff were refused; and, though no formal exception to this ruling appears in the record, we think the omission is supplied by the stipulation of counsel. But none of the evidence is before us; and in its absence, we cannot say but that the instructions were properly refused, because of an entire lack of evidence on which to base them. Error will not be presumed, but must be shown affirmatively." And in Baldwin v. Bornheimer,[134] the court said: "The evidence given to the jury does not appear in the transcript. The applicability of the instructions requested by the defendant cannot, therefore, be determined." Many other cases are to the same effect.[135]

But it is obvious that a refusal to give an erroneous instruction could not be the basis of error; therefore, there is no such qualification of the rule applicable, as is above stated, to instructions which are given. A mere abstract, erroneous instruction, where given, may be misleading, and therefore prejudicial;[136] but no harm can possibly result from a refusal to give such an

132 People v. Long, 39 Cal. 694, 697.

133 50 Cal. 129, 132.

134 48 Cal. 433; People v. Clark, 121 Cal. 633, 54 Pac. 147.

135 See Nelson v. Lemmon, 10 Cal. 49; White v. Abernathy, 3 Cal. 426; People v. Best, 39 Cal. 691; People v. Brotherton, 47 Cal. 407.

136 See ante, § 321.

instruction. Consent,[137] the making of any order which the court had power to make,[138] service of notices and other papers,[139] and many other matters,[140] will be presumed in sup-

137 Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48; Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888; McFadden v. Swinerton, 36 Or. 336, 59 Pac. 816, 62 Pac. 12. 2 Compiled Laws of Utah (1888), section 3199, authorizes the court to change the place of trial to the nearest court when the parties do not agree on the court to which the change shall be made. Held, that where the court so transfers a cause, and the record does not show the contrary, it will be presumed that the parties did not agree as to a court: Elliott v. Whitmore, 10 Utah, 246, 37 Pac. 461.

138 Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766; Hoeft v. Supreme Lodge, 113 Cal. 91, 45 Pac. 185, holding that where the record upon appeal from the judgment does not show that a demurrer interposed was not disposed of, it will be presumed against error that it was disposed of; Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55, that executor was substituted; nothing appearing to contrary, presumed that order made in proper time: Kerns v. McCauley (Idaho), 69 Pac. 539.

139 Sichler v. Look, 93 Cal. 600, 29 Pac. 220; La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765; Beach v. Spokane Ranch & W. Co., 25 Mont. 367, 65 Pac. 106; Murray v. Hauser, 21 Mont. 120, 53 Pac. 99; Fletcher v. Nelson, 6 N. Dak. 94, 69 N. W. 53.

140 It will be presumed that amendments were served: Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027; that findings were waived: Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; Benton v. Benton, 122 Cal. 395, 55 Pac. 152; Estate of Sanderson, 74 Cal. 199, 15 Pac. 753; Parker v. Beagle, 4 Idaho 453, 40 Pac. 61; that oral instructions were properly taken down by court reporter: People v. Ludwig, 118 Cal. 328, 50 Pac. 426; that a jury trial was waived, the judgment reciting that case was "regularly heard before the court sitting without a jury": Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; that, in case of judgment showing trial upon issues of fact, issue of law was first disposed of: People v. Barr, 61 Cal. 554; in case of two judgments appearing in the record that prior was set aside: Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264; that notice was amended, where a copy appeared in statement inconsistent with recitals of statement: Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700; that attorney signing pleading in judgment-roll introduced in evidence had authority: Coward v. Clanton, 70 Cal. 23, 21 Pac. 359; that counter-affidavits were filed, nothing appearing to show that

port of the judgment, in the absence of an affirmative showing to the contrary. But a very slight showing will be sufficient to negative any presumption requiring positive action by the court.

those in record were all that were filed, on appeal from order vacating levy of execution: Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; that the clerk in making up the judgment-roll regularly performed his official duty, and made it up within the proper time, including all papers then on file which should have gone into it: Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970; where the judgment-roll contains a copy of the affidavit of the mailing of the summons instead of the original, that the original affidavit had been lost, and that the copy was substituted therefor by the order of the court, upon a proper showing: Sichler v. Dook, 93 Cal. 600, 29 Pac. 220; that minor defendants, who were nonresidents of the state at the commencement of the action, and who were served with summons by publication, were over the age of fourteen years, and that no service of the summons or complaint, upon the parents or persons having them in charge was required: Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; that court properly refused to consolidate actions, there being nothing in record to show their character: Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; that proper ground existed for striking out a pleading, none being shown: Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730; that statement by court, that evidence has been offered tending to prove a particular fact, in the absence of the evidence, that its effect was as stated by the court: California Cent. Ry. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599; where findings are waived, that the court found all the matters of fact in issue and necessary to support its judgment in favor of the successful party: Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Long v. Saufley, 89 Cal. 437, 26 Pac. 902; upon collateral appeal from an order made in the court to which a cause was transferred that the judge who transferred the cause was disqualified, and that it was transferred to the nearest court in which the like objection did not exist: Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. Sometimes positive acts, outside of the regular proceedings in the cause, will be presumed to have been done, if such presumption be necessary to support the judgment; and where a judgment is entered in favor of the plaintiff in an action for the possession of the property, without an alternative judgment for its value in case delivery cannot be had, it will be presumed, upon appeal from the judgment, in the absence of any bill of exceptions, that it appeared at the trial that the plaintiff had already obtained possession of the property sued for: Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411.

Other presumptions.—That cause was regularly tried and submitted: Sherman v. Western Inv. Co. (Ariz.), 52 Pac. 1126; that a

Though, in the absence of any showing to the contrary, it will be presumed that findings, were waived, none being found in the record,[141] yet the presumption has no force where a writing clearly intended to be a finding upon a material issue, appears to have been filed by the judge of the lower court.[142]

plea in abatement not shown to have been urged in the lower court was abandoned: Southern Cal. Fruit Exch. v. Stamm, 9 N. Mex. 361, 54 Pac. 345; that costs were taxed and inserted in the judgment: Gould v. Elevated Co., 3 N. Dak. 96, 54 N. W. 316; that reference and proceedings by referee were regular: Trummer v. Konrad, 32 Or. 54, 51 Pac. 447; that supplemental complaint, appearing to have been used on a motion, was also a factor in the trial before jury: Robinson v. Carlon, 34 Or. 319, 55 Pac. 959; that application for separate trials was properly denied: Noyes v. Belding, 5 S. Dak. 603, 59 N. W. 1069; that order made by judge within territorial jurisdiction was made by court: Evans v. Bradley, 4 S. Dak. 83, 55 N. W. 721; that where the record on appeal shows requested instructions, some of which are marked "Refused" and others do not appear to have been refused or excepted to, the instructions not refused or excepted to were given by the trial court: Myers v. Longstaff, 14 S. Dak. 98, 84 N. W. 233; that evidence admitted generally, but admissible to prove only one issue, was introduced for that issue only, and not on other issues, not presented by the pleadings: St. Paul F. & M. Ins. Co. v. Dakota L. etc. Co., 10 S. Dak. 191, 72 N. W. 460; where in action to recover possession of land, the complaint containing no allegation that it lay in county where action brought, there being no application for change of venue, that it was brought in the proper county: Coleman v. Stalnacke, 15 S. Dak. 242, 88 N. W. 107; in absence of showing that charge of court was oral, that it was in writing as required by statute: Utah Optical Co. v. Keith, 18 Utah, 464, 56 Pac. 155; where a defendant demurs and afterward answers, but before trial withdraws the answer, and allows judgment to be entered, that he waived the demurrer, the record disclosing nothing to the contrary: Evans v. Jones, 10 Utah, 182, 37 Pac. 262; where the record discloses on order overruling a demurrer, that a demurrer was interposed and overruled, though none appears in the record: Commercial Light etc. Co. v. City of Tacoma, 17 Wash. 661, 50 Pac. 592; that a cause properly triable at the term in which it was heard was duly entered on the trial docket by the clerk, such being his duty: Syndicate Imp. Co. v. Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

141 See ante, § 590.

142 Kimball v. Stormer, 65 Cal. 116, 3 Pac. 408. To same effect, Ball v. Kehl, 95 Cal. 606, 30 Pac. 780. In delivering the opinion in the first case the court said: "But the writing filed by the court below as its 'decision,' or findings (which is a very different thing

And although, where the record is silent upon the question whether the defendant waived his right to trial by jury, it will be presumed upon appeal that a jury was waived as to issues tried by the court in the first instance, yet such presumption cannot be indulged where the record shows that a jury trial was had, and a verdict rendered upon vital issues; neither can

from an opinion), is always sent up here, and constitutes a part of the judgment-roll: Code Civ. Proc., § 670. It is only because the findings, sufficient or insufficient, are sent up as a part of the judgment-roll, that we can determine whether a particular finding is or is not sufficient. In one sense, an insufficient finding is not a finding, because it is not determinative of an issue, but in another sense an attempted finding found in the decision, filed as such by the court below, is a finding. It is to be treated as a finding in so far as it enters into the record to be reviewed in this court, and in that it clearly shows that findings were not waived by the parties. It has been held here, in support of the presumption that the trial court has done its duty, that we will (where there are no findings) presume that findings were waived, unless the contrary is made to appear by bill of exceptions. But this presumption cannot have force as against a writing, on its face designated the 'decision,' filed by the court below, clearly intended to be a finding upon a material issue, and showing that the court ordered a judgment in favor of defendant, because the evidence proved that one of the pleas of the defendant was true. The court below having attempted to find upon one of the material issues (the evidence not sustaining the finding), and having failed to find upon another material issue, the judgment must be reversed." And the opinion by Commissioner Van Clief in the second case is in part as follows: "But there is no finding upon the issue as to adverse user; and counsel for appellant contend that for this reason the decision is against law. The only answer to this point by respondent's counsel is that inasmuch as the record does not show that findings were not waived, it must be presumed that they were waived. But where, as in this case, the record contains written findings of fact and law, the presumption contended for has never been indulged. In this case the judgment-roll contains what purport to be findings of fact and law under the following recitals: 'This case having been heretofore tried and submitted upon the pleadings, evidence, and briefs of counsel, the court finds the following facts.' Following this are four paragraphs of findings of fact; and under the heading 'Conclusions of law' are four paragraphs of conclusions of law. Under these circumstances, I think there is no presumption that a finding on the issues as to adverse user was waived."

it be presumed from the fact that evidence was given before the court after a special verdict of the jury upon vital issues submitted to it, but which did not pass upon all of the issues joined in the case, that the verdict was voluntarily relinquished.[143]

§ 685. Further as to presumptions against error.

In the preparation of the record on appeal where error in admitting, or excluding, evidence is relied upon, nothing should be left to inference; otherwise, in keeping with the presumption, the inference will be against the appellant. Thus, in Clark v. Sawyer,[144] the court said: "The case shows that when the deeds were produced in evidence—more than sixteen years after they were made—they bore no seals, but it fails to show whether they were, or were not, in fact, sealed, at the time they were made. They purported to have been sealed, for they closed with the words: 'In witness whereof, I, the said John C. Hayes, sheriff, have hereunto set my hand and seal,' etc.; and were 'signed, sealed and delivered in the presence of' a subscribing witness. The objection was, that they 'appeared never to have been sealed by the said Hayes.' This objection was overruled, and, so far as we can know from the record, properly. Upon inspection, it may have appeared to the court that the deeds were sealed, and that the seals had become detached. The further objection to two of the deeds that the certificates of acknowledgment which purported to have been made by a notary public, 'do not appear to bear his official or other seal,' may be answered in the same way. Though they bore no official or other seal when exhibited in evidence, it may have been clear that they were properly sealed when made. The objection is met by the rule that he who alleges error, must make it clearly to appear." And where it was urged as error that the original notes of the reporter were not filed with the transcript, as required by law, the court said: "But the record does not show that they were not filed. The presumption is, in support of the judgment, and it is the duty of the appellant

143 Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648.

144 48 Cal. 133, 141. See, also, Thompson v. Morrow, 2 Cal. 99, 56 Am. Dec. 315.

to make an alleged error apparent from the record. It may be that it appeared that the original notes were on file." [145] And the rule applies where insufficiency of evidence is assigned for error, and the record discloses something from which it may be reasonably inferred that the requisite evidence was introduced, and the record gives no explanation to rebut the inference. Thus, where it was urged that there was no evidence in support of an allegation that a guardian ad litem for an infant was appointed, and the record showed that, during the trial, plaintiff's counsel handed a paper to the clerk, saying: "This is the paper in reference to the guardian ad litem," the court said: "It therefore appears that a paper in relation to the guardian ad litem was in evidence. What were its contents? It certainly was incumbent upon the appellants to show what the contents were, notwithstanding that, it was not a most complete and perfect appointment. The presumption is in

145 People v. Grundell, 75 Cal. 301, 304, 17 Pac. 214. In the first case the court said: "We cannot say the court abused its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file." In the second case, Chief Justice Beatty delivering the opinion, said: "Appellants have made no point in the argument upon the refusal of leave to amend, probably for the reason that they have never specified either in the superior court, or in this court, any amendment that they could make, or that they desired to make." In the absence of such specification it cannot be held that the superior court abused its discretion in denying leave to amend." In Babcock v. Caldwell, supra, the court said: "The record contains a copy of an amended answer. It further appears that 'on the trial of said cause the said amended answer was further amended by leave of court, which said amended answer so amended was in the words and figures following, to wit: (Here insert said amended answer as amended.)' But neither the amendment nor the amended answer as amended is inserted. Nothing is contained in the transcript by which the character or substance of the amendment is revealed. The effect of the amendment was to supersede the amended answer, which thereupon ceased to perform any office as a pleading. What issues, if any, were made by the amended answer, as amended, we cannot determine. The defendant's attention was invited on the oral argument to this condition of the record; but he has not suggested a diminution, nor asked to have the seeming error corrected."

favor of the judgment, and the party alleging error must make it affirmatively appear."[146] So, where it was claimed that the judge who tried the case was disqualified, and there was no satisfactory evidence of his disqualification in the record, the court said: "If counsel wish to establish a fact on which this court can act, they must do it by the introduction of evidence, the admission of the opposite counsel, a certificate of the judge who tried the case, or a positive statement of the circumstances as having in some way been shown on the trial."[147]

§ 686. Further as to presumptions on appeal and their rebuttal.

A party will often be deprived of the benefit of a point which might otherwise be available on appeal by a failure to move to strike out evidence admitted conditionally, in the trial court, though the record fail to show a compliance with the condition. Thus where a witness was permitted to testify against the objections of the plaintiff to certain declarations, upon the express understanding that it was not to be considered unless a proper foundation should be subsequently laid, which was not done, it was presumed that the evidence was disregarded by the court.[148] In such case, the party against whom the testimony is admitted conditionally should, upon failure to perform the condition, move to strike it out. If the motion be granted, the evidence is eliminated; if it be denied, then the presumption that the court disregarded it is overcome. And where a pleading is amended, and the amendment is alleged as error, the appellant should have the record clearly show what the amendment was, else it will be presumed to have been proper.[149] It would be the same if the objection were that the court had improperly refused to permit an amendment.[150] So, the ac-

146 O'Callaghan v. Bode, 84 Cal. 489, 497, 24 Pac. 269.

147 Frewitt v. Swift, 19 Nev. 400, 402, 13 Pac. 6; State v. Manhattan S. M. Co., 4 Nev. 329.

148 Jones v. Moise, 36 Cal. 205; King v. Haney, 46 Cal. 560, 13 Am. Rep. 220; Osgood v. Osgood, 35 Or. 1, 56 Pac. 1017.

149 Martin v. Thompson, 62 Cal. 622; Burling v. Newlands, 112 Cal. 476, 44 Pac. 810; Anderson v. Cook, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113; Babcock v. Caldwell, 22 Mont. 460, 56 Pac. 1081.

150 Jessup v. King, 4 Cal. 331.

tion of the lower court in reopening a cause after its submission will be presumed correct in the absence of a bill of exceptions showing a proper application upon sufficient grounds.[151]

Where a question is raised upon the statute of limitation, the record should show when the complaint was filed. Accordingly, in Miles v. Thorne,[152] the court said: "The record with which we have been furnished, fails to show when the action was commenced. The complaint was amended, and the amended complaint, only, has been brought up. That was filed on the 6th of March, 1867. There is neither memorandum, certificate or stipulation showing when the original complaint was filed. All presumptions are in favor of the judgment below, and we must, therefore, presume that the action was not commenced until after the expiration of four years from the time at which, under the contract, the plaintiff became entitled to a conveyance. If the fact be otherwise, the appellant should have caused it to so appear upon the record."

There is an inference in favor of the regularity of a proceeding, and of the granting of leave by the court, when that is necessary to its validity. Thus, where the record did not show when an amended answer was filed, nor the circumstances, nor its service upon the opposite parties, and, for that reason, it was claimed that it was a nullity, the court said: "In favor of the regularity of the proceedings in the court below, we must presume that the second answer was served on the other parties, and filed with the permission of the court." [153] And where the action was based upon a foreign judgment, upon which the plaintiff was not entitled to interest, and it was for an amount considerably in excess of that of the judgment sued on, and there was nothing in the record showing the ground upon which the excessive amount was allowed, the court affirmed the judgment upon the theory that it might have re-

151 Miller v. Sharp, 49 Cal. 235.

152 38 Cal. 335, 337, 99 Am. Dec. 384, and note. See, also, O'Connor v. Adams (Ariz.), 59 Pac. 105.

153 Livermore v. Webb, 56 Cal. 489, 492. See, also, Ford v. Bushard, 116 Cal. 273, 48 Pac. 119; Montgomery v. Merrill, 62 Cal. 385; Erpenbach v. Railroad Co., 11 S. Dak. 201, 76 N. W. 923. From a recital that order was regularly made, notice presumed: Smalley v. Laugenour (Wash.), 70 Pac. 786.

sulted from the addition of costs.[154] So, consent of the party complaining, will be presumed where it may be reasonably inferred, and would be sufficient to constitute regularity in the proceedings. And where a judgment was set aside upon motion, and a different judgment entered, and the record was silent as to the grounds upon which the court acted, the order was affirmed, the court saying: "The files and affidavits used at the hearing are not inserted in the transcript. For anything we can know to the contrary, there may have been a stipulation among the files, or one might have been brought forward by affidavit, fully accounting for all the phenomena put as the basis of the argument submitted for the appellant—and conserving also the plaintiff's right to a several judgment against Clark—and by direct expression."[155] And the same presumption of consent was held to operate in support of an order striking out a motion for a new trial;[156] also where the action was dismissed as to necessary parties, nothing more appearing.[157]

The presumption in favor of a waiver of findings, where the contrary is not shown, has been already considered.[158]

154 Thompson v Morrow, 2 Cal. 99, 56 Am. Dec. 318. In Ford v. Bushard, supra, the court said: "Defendants claim that the order of substitution of Carrie E. Ford was made ex parte. There is no showing in the record on the subject. If the order was made without notice, the answer of the defendants to the supplemental complaint without objection was a waiver of the error: Smith v. Curtis, 7 Cal. 584. Were it otherwise, we are, in the absence of any showing on the subject, to presume in favor of the regularity of the proceedings that notice was given."

155 Leese v. Clark, 28 Cal. 26, 38.

156 Wilson v. Daugherty, 45 Cal. 34. In this case the court said: "The propriety of the order striking out the notice of motion for a new trial cannot be considered, inasmuch as no statement in support of the appeal from the order is presented. Every presumption and intendment consistent with the record is to be indulged in favor of the order, and so far as the record here speaks it would not be inconsistent with it to presume that the plaintiff consented to the order, in which case, of course, he could not afterward be heard to complain of it."

157 Parker v. Altschurl, 60 Cal. 380. See, also, Clark v. Porter, 53 Cal. 409; Diggins v. Reay, 54 Cal. 525; Harney v. Applegate, 57 Cal. 205.

158 See ante, § 590.

The making of proper orders and appointments,[159] and the giving of assent or authority,[160] will often be presumed.

§ 687. Presumptions in cases of statements and bills of exceptions.

The presumption of regularity and correctness operates to the benefit of appellants in the case of formally and substantially sufficient bills of exceptions and statements. Some discussion of these presumptions is to be found elsewhere.[161]

The serious results of taking a case to the appellate court upon a record which shows or indicates that there was other evidence, or facts, brought in any other way to the attention of the lower court, and not set forth, were, to some extent, explained in the preceding sections. To such a bill or statement as mentioned above, attach the following presumptions: that it contains all the material evidence;[162] that it was presented in time and the regular steps taken for its settlement;[163] that facts contained came into the cause regularly.[164]

159 Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Blish v. McCornick, 15 Utah, 188, 49 Pac. 529; Warren v. Robinson (Utah), 70 Pac. 989. Due appointment of referee, making report presumed: Kent v. Ins. Co., 2 S. Dak. 300, 50 N. W. 85; Jerauld Co. v. Williams, 7 S. Dak. 196, 63 N. W. 905.

160 Field v. Romero, 7 N. Mex. 630, 41 Pac. 517.

161 Ante, § 427 et seq.

162 See Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Randall v. Burk Tp., 4 S. Dak. 337, 57 N. W. 4; Wright v. Sherman, 3 S. Dak. 367, 53 N. W. 425.

163 Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Gray v. Nunan, 63 Cal. 220; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318; People v. Cox, 76 Cal. 128;, 18 Pac. 332, holding that a settled and certified bill of exceptions imports absolute verity of the settlement is not attacked as provided by statutes: Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789; Young v. Rosenbaum, 39 Cal. 646. See, also, Center Creek W. & Irr. Co. v. Thomas, 19 Utah, 360, 57 Pac. 30; Board Commrs. v. Shaffner (Wyo.), 68 Pac. 14; Baird v. Gleckner, 3 S. Dak. 300, 52 N. W. 1097. Usually the statement should show the court's action on the motion; but in Arizona, under Laws of 1891, act No. 49, providing that, in case of no ruling on a motion for a new trial, it shall be deemed to have been denied,

Sometimes the issues made, or attempted to be made by the pleadings will preclude the idea that there was anything upon which the action of the court can be upheld. Thus, where, on an appeal from an order dismissing a petition for the payment of a claim against an estate which had been allowed and approved, the court said: "The absence of the testimony from the record is immaterial, for the reason that, under the allegations in the pleadings, it could not possibly aid the respondent. The objections to the payment of the claim, as set forth by the administrator in the pleading, being insufficient in themselves, it cannot be intended, even in the absence of the evidence that the court below found some other fact not relied upon in the pleading, but which, if it had been pleaded, would have justified the judgment of the court." [165]

§ 688. Limitation by rule that matter complained of must affect a party entitled to take an appeal and actually appealing.

Since any party aggrieved by the judgment or an order, may appeal and have the same reviewed, notwithstanding appeals taken by others in the same action or proceeding, it follows that the appellant, and no one else, may assign and urge error

where the record showed a motion for a new trial, but no action taken thereon, the court, on appeal, will treat the same as denied by operation of law: Svea Ins. Co. v. McFarland (Ariz.), 60 Pac. 936. If the trial judge certifies that the bill of exceptions contains all the evidence offered by plaintiff up to the time that plaintiff rested her case in chief, and defendants filed their motion for a nonsuit, cannot be objected that it does not contain the record of the cross-examination of plaintiff's witnesses: Thomas v. Bowen, 29 Or. 258, 45 Pac. 768. In California, no such recital in the certificate of the judge is necessary. The supreme court will not presume from the fact that the testimony is in narrative form, that it is not all in the record, where the trial judge has certified that the statements of facts and exhibits attached contained all the material proceedings occurring at the trial: Murray v. Shoudy, 13 Wash. 33, 42 Pac. 631.

164 Estate of Marre, 127 Cal. 128, 59 Pac. 385; Jones Lumber Co. v. Farris, 5 S. Dak. 348, 58 N. W. 813. Otherwise, where bill or statement shows on its face that irrelevant matters therein vested were not presented to the court at the time it made the ruling appealed from: Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

165 Estate of McKinley, 49 Cal. 152, 155.

upon each particular record on appeal.[166] But, in a suit by a lien claimant against the owner of the property and other lien claimants, where an issue as to the priority of the liens is raised, the fact that the owner does not appeal from a judgment for plaintiff for the amount of his claim, which was rendered before the expiration of the owner's time for answering, does not prevent his codefendants from raising the objection, since they are aggrieved thereby.[167] The principal rule is as applicable to the respondent[168] as to outside parties.[169] It was so held

166 See Glenn v. Hill, 11 Wash. 451, 40 Pac. 141; Langert v. David, 14 Wash. 389, 44 Pac. 875; Pepperall v. City Park Transit Co., 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; Conrad v. Pacific Packing Co., 34 Or. 337, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021; Sabin v. Burke, 4 Idaho, 28, 37 Pac. 352; Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243; Charez v. Myers (N. Mex.), 68 Pac. 917. In Glenn v. Hill, supra, the Washington supreme court said: "Counsel for the respondent devotes considerable space in his brief to supposed errors of the court, committed to the prejudice of the respondent. But, inasmuch as he has taken no appeal from the judgment, we are unable to notice them. 'Without an appeal a party will not be heard in an appellate court to question the correctness of the decree of the trial court': United States v. Blackfeather, 155 U. S. 180, 15 Sup. Ct. Rep. 64."

167 Murray v. Guse, 10 Wash. 25, 38 Pac. 753.

168 Travers v. Crane, 15 Cal. 12, 21. See, also, Morley v. Elkins, 37 Cal. 454; Daugherty v. Henarie, 47 Cal. 9, 13; Poppe v. Athern, 42 Cal. 606; Pierce v. Jackson, 21 Cal. 636; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246; Thornton v. Krimbel, 28 Or. 271, 42 Pac. 995; Tacoma (City of) v. Tacoma Light etc. Co., 17 Wash. 458, 50 Pac. 55; Betz v. People's Building, Loan etc. Assn., 23 Utah, 604, 65 Pac. 592. Though respondent does not appeal from a ruling throwing the burden of proof on him, yet, it being erroneous, appellant cannot contend that sufficient proof was not made: Bellingham Bay Imp. Co. v. City of New Whatcom, 20 Wash. 231, 55 Pac. 630; and he may urge error in overruling his objection that the attorney appearing below for a defendant corporation was not authorized so to do, without appealing from the judgment, which was entirely in his favor: Jenkins v. Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785. In Trevaskis v. Peard, supra, the court said: "Thomas Peard is the only defendant interested in this hearing. But as he appears merely as respondent, and has himself prosecuted no appeal, his attack upon certain findings and conclusions of law which he claims are unsupported or unsound cannot be considered. The objections which may be reviewed are those alone which appellant urges." In Thornton v. Krimbel, supra, the court said: "The defendants not having taken a cross-appeal, it must be pre-

even where, on appeal by plaintiffs from the judgment, the defendants assigned, by stipulation, error in setting aside an order overruling a motion for a new trial.[170] And where a plaintiff, under direction of the trial court, had remitted part of the amount awarded him by the verdict, and the defendant appealed from an order denying him a new trial, and the respondent insisted on said appeal that he was entitled to the whole amount so awarded, the court remarked that it could not act upon any such question, as the plaintiff had not appealed from the judgment.[171] And the same rule precludes an appellant from availing himself of errors committed, and irregularities occurring, which affect only a coparty who does not join in the appeal;[172] also precludes him from referring, for the purposes of his appeal, to exceptions reserved at the trial by the respondent.[173] And where two codefendants were

sumed that they were satisfied with the decree, and cannot now be heard to complain of a failure to allege or prove the existence of a mutual mistake, and hence it follows that the decree is affirmed."

169 See Hall v. Southern Pac. Co. (Ariz.), 57 Pac. 617, holding that where plaintiff in replevin fails to establish his right to the property, he cannot complain of the finding that the title was in one whose right was not asserted in the pleadings. The supreme court will not determine the constitutionality of a statute at the instance of parties not affected by its provisions: State v. Donovan, 10 N. Dak. 203, 86 N. W. 709.

170 Paul v. Magee, 18 Cal. 699.

171 Hathaway v. Brady, 23 Cal. 122.

172 McCreery v. Everding, 44 Cal. 284. See, also, Pearson v. Creed, 78 Cal. 144, 20 Pac. 302; McDonald v. Taylor, 89 Cal. 42, 26 Pac. 595; Tripp v. Duane, 74 Cal. 85, 15 Pac. 439; Ball v. Nichols, 73 Cal. 193, 14 Pac. 831; March v. Barnet, 114 Cal. 375, 46 Pac. 152; Mock v. Santa Rosa (City of), 126 Cal. 330, 58 Pac. 826; Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323; Gregg v. Commers, 22 Mont. 511, 57 Pac. 92; Hoffman v. Commissioners, 18 Mont. 224, 44 Pac. 973. But see Inman v. Henderson, 29 Or. 116, 45 Pac. 300, holding that a mortgagee, as against whom a mechanic's lien has been adjudged invalid on his answer, may insist on its invalidity on appeal by the lien claimant, though no appeal is taken from that part of the decree holding it valid against the owner of the property.

173 Jackson v. Feather River W. Co., 14 Cal. 19, 22. See, also, Orange County Fruit Exch. v. Hubbell, 10 N. Mex. 47, 61 Pac. 121; Buck v. Fitzgerald, 21 Mont. 482, 54 Pac. 942. Where the testimony

interested adversely to each other, and demurrers interposed by them respectively were overruled as to one and sustained as to the other, whereupon the one whose demurrer was overruled suffered judgment to go against him, and then appealed, it was held that he could not, on appeal, avail himself of any error in sustaining the demurrer of his codefendant.[174] So, where only one of several defendants moves for a new trial, the others have no standing for the purpose of appealing from an order denying his motion.[175] Nor does the fact that the transcripts on different appeals are printed and presented under the same cover alter the rule as to parties appealing.[176]

§ 689. Limitation by rule that judgment or order not disturbed for immaterial or nonprejudicial matters.

It is an established canon of decision in appellate courts that no judgment or order will be reversed or modified for nonprejudicial error. The word "error" is almost universally used in this connection to denote, not only what is strictly error, but also irregularity and abuse of discretion. The term will be hereinafter frequently used in this broader sense. And the word "prejudicial" is often used by the courts interchangeably with "material" meaning the same thing. A better understanding of the decisions would result if all alleged causes for reversal and modification were treated and considered as belonging either to the material or to the immaterial class. The lax use of terms is well calculated to, and often does, confuse and fall short of elucidation, which is the end in view. For instance, where material but incompetent evidence is introduced and subsequently stricken out by the court, it is said to be er-

of the plaintiff as to the agreement between him and his deceased father was excluded on the objection of the defendant, the defendant cannot be heard to claim upon appeal that the judgment should be reversed for want of such testimony: Harp v. Harp, 136 Cal. 421, 69 Pac. 28.

174 People v. Leet, 23 Cal. 162. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence: Murray v. Montana etc. Co., 25 Mont. 14, 63 Pac. 719.

175 Calderwood v. Brooks, 28 Cal. 153.

176 See ante, §§ 640, 641.

ror without prejudice. But striking it out does not deprive it of the prejudicial quality which the law attaches to it, though that be obviated by striking it out. Would it not be equally appropriate to say that it is immaterial error?

There is a technical distinction between immaterial and non-prejudicial error which is not overlooked in giving expression to the foregoing views.[177] The established forms of expression must, however, be deferred to, to a great extent, for present purposes.

177 Within the technical definition of immaterial error come all those instances where the appellate court applies the maxim, "De minimis non curat lex." See McAllister v. Clement, 75 Cal. 182, 16 Pac. 775; Wolff v. Prosser, 73 Cal. 219, 14 Pac. 852; Clark v. Collier, 100 Cal. 256, 34 Pac. 677; Tobin v. Portland Mills Co., 41 Or. 269, 68 Pac. 743, 1108; Johnson v. Cook, 24 Wash. 474, 64 Pac. 729. And it is a general rule that a judgment will not be reversed for mere technical errors of law, which are of too little consequence to be substantially prejudicial: See Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; White v. White, 82 Cal. 427, 23 Pac. 276. To the same class belong cases where evidence, admitted against objection, relates only to an issue which is rendered immaterial by the evidence and findings upon other issues which are decisive of the case: See Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Lyon v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018; Pringle v. Hall (Ariz.), 56 Pac. 740; Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139; Hamilton v. Woodworth, 17 Mont. 327, 42 Pac. 849, case of special verdict; Fowler v. Phoenix Ins. Co. of Hartford, Conn., 35 Or. 559, 57 Pac. 421; Stevens v. Rogers, 16 Utah, 105, 51 Pac. 261; Merchants' Nat. Bank v. Peet, 9 Wash. 237, 37 Pac. 290. When essential to the determination and preservation of an important legal right, a judgment will be reversed to enable a party to recover merely nominal damages: Olson v. Huntimer, 8 S. Dak. 220, 66 N. W. 313. Also cases where the record shows that the appellant is not entitled to recover in any event, error in rulings of the court upon the admission of evidence cannot entitle him to a reversal of judgment: See McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; Estate of Spencer, 96 Cal. 448, 31 Pac. 453. For another instance of the immaterial error, see Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164, where a plaintiff in an action of partition sued in her individual capacity, and also in her capacity as administratrix, and the decree as to the appellant's interest in the land partitioned was the same as it would have been if the administratrix had not been a party, and it was held that the relief granted to the administratrix was in no wise to the prejudice of the appellant, and that an objection that there was a misjoinder of the administratrix would not be considered upon appeal.

In some of the cases, the appellate court appears to have simply noted the character of the error, and then placed itself in the seat of the trial judge, and held that, in view of the correctness of his final conclusion, or action, the error should not be considered material, even in the absence of anything in the record specially offsetting or curing the error.[178]

On same principle held harmless error to render judgment in excess of plaintiff's claim where judgment in rem only, and the proceeds of the property levied upon and sold were insufficient to pay the amount actually due: Southern California Fruit Exchange v. Stamm, 9 N. Mex. 361, 54 Pac. 345. Also within definition errors in admission of evidence before jury in equity case where court makes it own findings on the evidence, regardless of the verdict: Haggin v. Saile, 23 Mont. 375, 59 Pac. 154. A defendant cannot complain of a judgment for less than the full amount of plaintiff's claim on the ground that, if recovery be had, it must be for the full amount: White Sulphur Springs (Town of) v. Pierce, 21 Mont. 130, 53 Pac. 103. A plaintiff whose complaint would not support a judgment for him and the defect in which has not been waived or cured by other pleadings, cannot complain of errors at the trial, in case of nonsuit: Kimball Co. v. Redfield, 33 Or. 292, 54 Pac. 216. A failure to find further facts is not reversible error, if, when found, they must necessarily have been adverse to the appellant: Billings v. Parsons, 17 Utah, 22, 53 Pac. 730. Where the verdict is directed by the court, error in summoning the jury is immaterial: State v. Trimbell, 12 Wash. 440, 41 Pac. 183.

178 Baker v. Southern Pac. Ry. Co., 114 Cal. 501, 46 Pac. 604, where it was held that notice should be given of a motion for leave to file an amended complaint, but that where, for aught that appears in the record upon appeal, the motion should have been granted had due notice been given, the granting of leave to amend without notice is without prejudice: Von Schmidt v. Von Schmidt, 115 Cal. 239, 46 Pac. 1056; where the court said: "The judgment is so clearly favorable to the appellant that it should not be reversed, unless for some material error which is quite clear and palpable": Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386, where it was held that in the absence of any showing to the contrary it will be presumed that the action of the court in permitting a portion of the testimony to be read to the jury when they had returned for further instructions was without prejudice, thus reversing the oft referred to presumption as to the prejudicial effect of error, as in Bedan v. Turney, 99 Cal. 649, 34 Pac. 442, where it was held that upon an appeal from a judgment upon a judgment-roll alone nothing can be assumed or considered that does not appear upon the face of the roll, that if that discloses error it cannot be assumed that the error was cured by matter not appearing in a bill of exceptions

Whether an error has prejudiced a party is a judicial question, to be decided in each case according to the character of the error and circumstances shown by the record. Being such, and the question of whether or not it has been prejudicial in its consequences, being uniformly decided by reference to the record, it is difficult to see any place for the operation of what is called a presumption of prejudice. As matter of practice, cases are not reversed for error, unless, and until, from its character, and in view of the whole case presented by the record, there is at least a possibility of injury.

If the error be trivial in character, the courts say that it is "immaterial," or "without prejudice," whether or not there be anything in the record which can be identified as specially nullifying or offsetting it. And, usually, the decision is not rested upon presumption, but upon evidence; that is to say, evidence which establishes respectively, the possibility or improbability of resulting prejudice. No better elucidation of the controlling principle herein is to be found than that of Justice Temple in the opinion in San Jose Ranch Co. v. San Jose L. & W. Co.;[179] and yet the learned jurist does not allude to any presumption.

The proposition that "error is presumed to be prejudicial, unless the contrary appears" has been more frequently advanced in criminal than in civil cases; but it is noticeable that courts rarely, if ever, stop with its bare enunciation. They invariably proceed to discuss the record and point out the possibility of

which form part of the judgment-roll, though it does not purport to contain all the evidence; to same effect, Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861, holding that injury presumed from improperly overruling a demurrer, unless respondent clearly make it appear to the contrary, and in some cases appellate courts have, upon a review of the record, simply expressed an opinion that the judgment was clearly right, without reference to the error, and thereupon refused to reverse it: See Yori v. Cohn (Nev.), 67 Pac. 212. In Wright v. Stewart, 19 Wash. 179, 52 Pac. 1020, the appellate court appears to have weighed the evidence. It held that where a witness testified as to declarations of defendant, error in admitting evidence that a stranger to the suit made similar declarations was harmless, the defendant and the stranger both denying making such declarations.

179 126 Cal. 322, 325, 58 Pac. 824. A quotation from the opinion is inserted at § 695.

prejudice, saying, in substance: "We find in the record evidence of a possible injury which is sufficient for the purposes of our decision." In some cases, it has been said, and in others intimated, that the proposition is one of universal application; and to be of any value as a legal proposition, it must be so, or, at least, so with well-defined exceptions. If the proposition were of uniform, binding force, as one of law, it might happen that a plaintiff's case was made out by the testimony of a dozen witnesses to the only fact in issue, no evidence being offered by the defendant, and yet, if there were one clear error in admitting the testimony of one witness, the defendant would be entitled to a reversal. But probably no appellate court could be found at the present day to reverse under such circumstances. And yet numerous cases are to be found in which it appears that courts considered themselves bound to recognize a rule which, if carried out fully in practice, would sanction such a result. Thus, in Humphreys v. Harkey,[180] the court, after referring to a prior decision to the same effect, said: "We are entirely satisfied of the correctness of that decision, and it results that the court below erred in the rejection of the proffered testimony. The circumstances mentioned by the learned judge who tried the cause, to the effect that even if the excluded testimony was admitted and considered, he should still have to find that there was a continued change of possession, cannot, it is obvious, avoid the necessity of a reversal of the judgment and order. The evidence ruled out was competent and material, and the defendant had a right to have it admitted and considered. The effect to be given to it, when admitted, is altogether another question." And the same rule was held to apply to the judge of the lower court in passing upon motions for new trial, whether the trial was by the court or a jury. Thus, in Spanagel v. Dellinger,[181] the judge, in passing upon a motion for a new trial, said he had no doubt but that he had committed an error in admitting certain evidence,

180 55 Cal. 283. See, also, Estate of Kennedy, 104 Cal. 429, 38 Pac. 93, holding that error in the admission of evidence is ground of reversal, unless the appellate court can see from the record that appellant was not injured thereby: Estate of Taylor, 92 Cal. 564, 28 Pac. 603.

181 38 Cal. 278, 282.

but that, aside from such evidence, there was an abundance of evidence to support the decision, and therefore denied the motion. The supreme court, in reversing the order, said: "After such incompetent evidence had been at the trial admitted, and acted upon by the court in making up its findings and judgment, it was not competent for the judge, on motion for a new trial, to undertake to determine, after admitting error in the admission of this evidence, that it was cumulative only, and that there was sufficient evidence, independent of it, to justify the findings, and, upon that ground, deny a new trial. From the admission of improper evidence on the trial, pertinent to any material issue, unless the same be withdrawn before the submission of the cause to the court or jury, injury is presumed to result to the party against whom such evidence is admitted, and he is entitled to a new trial upon proper application therefor, and no distinction can, in that respect, be made between causes submitted to a jury for a general or special verdict, or to the court without the intervention of a jury." So, in Bussenius v. Coffey,[182] where the error found was in the refusal of the court to give an instruction, the court said: "We cannot undertake to determine to what extent the plaintiffs were prejudiced, or whether prejudiced at all, by the refusal of the court to give this instruction. The record does not, of course furnish us with a perfect history of the trial, and even if it did, the grossest injustice might be done if we should decline to interfere with the judgment upon the ground that the action of the jury was not influenced by the error of the court." And in Jackson v. Feather River Co.,[183] the court

182 14 Cal. 91, 94.

183 14 Cal. 19, 25. See, also, Hausman v. Hausling, 78 Cal. 283, 20 Pac. 570; Norwood v. Kenfield, 30 Cal. 393, 89 Am. Dec. 116; Rice v. Heath, 39 Cal. 609; Sweeney v. Reilly, 42 Cal. 402; People v. Murphy, 47 Cal. 103; Ponce v. McElvy, 51 Cal. 222; People v. Furtado, 57 Cal. 345; Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Perrin v. Montana Cent. Ry. Co., 22 Mont. 290, 56 Pac. 315; Carney v. Duniway, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; Collett v. Northern Pac. R. Co., 23 Wash. 600, 63 Pac. 225. Where evidence is erroneously rejected on the sole ground of incompetency, it is presumed to have been material, even though the record does not disclose the substantial nature of the conversation: Owens v. Frank, 7 Wyo. 457, 53 Pac. 282, 75 Am. St. Rep. 932. As to presumption of effect of error in South Dakota, see Wendt

said: "We cannot see clearly that the defendants were not injured by this error. They might not have been; but the rule is, that every error is prima facie an injury to the party against whom it was made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been, or was, done by the error. We regret to be obliged to send this case back on so small a point, but so the law, as we read it, ordains."

In most cases of reversals for erroneous admission or exclusion of evidence, the evidence admitted or rejected was not only offered or admitted upon a material issue, but the possible effect, upon the result was discussed by the appellate court. Thus, in Carpentier v. Williamson,[184] the court, speaking with reference to the erroneous admission of certain documents in evidence, said: "Their admission in evidence was therefore error, and as the finding of title in Adams must necessarily have been affected by this testimony, it follows that the judgment must be modified as hereinafter indicated, or reversed and a new trial had."

The same tendency to dwell upon the possible, or probable, effect upon the result is seen where errors, other than in the admission or rejection of evidence, were under review. Thus, in Kelly v. Taylor,[185] where error was apparent in the charge to the jury, the court said: "We do not consider the verdict by any means excessive in amount—but we do not sit to determine what it should have been under proper instructions from the court; and we cannot say what it would have been had the charge excepted to not been given. For this error, the judgment should be reversed, and a new trial granted." So, in

v. Railway Co., 4 S. Dak. 476, 57 N. W. 226. In Ingram v. Golden Tunnel Min. Co., 25 Wash. 318, 65 Pac. 549, it was held that error in the admission of immaterial evidence and in making findings of fact was harmless unless the appellant could show that the judgment was based thereon, or that he had been subjected to unnecessary costs thereby. This decision cannot be reconciled with that in Collett v. Railroad Co., supra. See, also, North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750.

184 25 Cal. 154, 163.

185 23 Cal. 11, 15.

Yonge v. Pacific Mail S. S. Co.,[186] also a case of erroneous instructions, the court said: "The case was tried by a jury, and it is impossible for us to tell upon what particular portion of the evidence they founded their verdict, or what instructions controlled them. They may have found for the plaintiff entirely upon these erroneous instructions—or they may have disregarded them entirely. It is sufficient, however, if it appears that they might have been influenced thereby, to make it our duty to send the case back for a new trial, that the error may be corrected."

The nonprejudicial character of error is not shown, in the case of an erroneous instruction, as to the burden of proof in an action for damages for negligence, merely because the court is of the opinion that, had the instruction been framed as to meet all the requirements of the law, the verdict of the jury would have been the same. In Bjorman v. Ft. Bragg etc. Co.[187] the trial court misstated the law of negligence, with respect to the burden of proof, and also with respect to the liability of the defendant. The supreme court held that the order granting a new trial for these errors must be affirmed, without reference to the evidence of the opinion of the trial court that the verdict would have been the same under proper instructions.

A judgment will, in a proper case, be as readily reversed for a refusal to give proper instructions, not covered by any that are given, as in case of the giving of prejudicially erroneous instructions.[188] Thus it was held that the rule that the verdict, being right upon the evidence, the judgment should not be reversed because of an erroneous instruction had no application where an erroneous instruction cut off a substantial defense on the merits.[189] Nor are the errors in refusing proper instructions requested to be given by a party, and in giving

186 1 Cal. 353.

187 104 Cal. 626, 629, 38 Pac. 451. The admission of improper testimony on the question of damages is not cured by proper instructions on the measure of damages: Kohne v. White, 12 Wash. 199, 40 Pac. 794.

188 Stanton v. French, 83 Cal. 194, 23 Pac. 355.

189 Burnham v. Stone, 101 Cal. 164, 35 Pac. 627.

erroneous instructions asked for by the opposite party, cured by an oral charge of the court covering the same points, if the oral charge be confusing and contradictory.[190]

The cases in which the courts have refused to reverse or modify for admitted errors, held immaterial without prejudice, or cured, are very numerous. The facts and transactions in the lower court which render errors harmless, or of no consequence, are likewise of great number and variety. Perhaps the form in which error is most frequently cured is where the evidence erroneously excluded, or substantially the same, is subsequently admitted,[191] or the facts sought to be proved by the excluded evidence are otherwise established.[192] And the same effect is produced by subsequently admitting a fact sought to be proved by evidence erroneously admitted, as by being permitted to subsequently fully prove it after the erroneous exclusion of evidence.[193]

190 Vallens v. Lillmann, 103 Cal. 187, 37 Pac. 213.

191 See Casta v. Silva, 127 Cal. 351, 59 Pac. 695; Robinson v. Nevada Bank, 81 Cal. 106, 111, 22 Pac. 478; Gruell v. Spooner, 71 Cal. 493, 495, 12 Pac. 511; People v. Ross, 115 Cal. 233, 46 Pac. 1059; People v. Clarke, 130 Cal. 642, 647, 63 Pac. 138; People v. Plyler, 126 Cal. 379, 58 Pac. 904; Alexander v. C. L. & M. Co., 104 Cal. 532, 38 Pac. 410. Same principle, Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572; State v. Smith, 8 S. Dak. 547, 67 N. W. 619; Erickson v. Sophy, 10 S. Dak. 71, 71 N. W. 758; Kielbach v. Chicago etc. Ry. Co., 13 S. Dak. 629, 84 N. W. 192; Hermiston v. Greene, 11 S. Dak. 81, 75 N. W. 819; Quandt v. Smith (Wash.), 69 Pac. 369.

192 See MacKenzie v. Hodgkin, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; Commercial Bank of Madera v. Redfield, 122 Cal. 405, 55 Pac. 160; Williams v. Caseheer, 126 Cal. 77, 58 Pac. 380; People v. Johnson, 106 Cal. 289, 39 Pac. 622; Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075; Jansen v. Bowles, 8 N. Dak. 570; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187; Rock Springs Nat. Bank v. Luman (Wyo.), 43 Pac. 514; Kuhn v. McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 502. Where the answer is a mixed question of law and fact and the witness has answered against the objection that the question calls for a conclusion, the error may be cured by a disclosure of the facts upon which the conclusion is based, either in direct or cross-examination: Olson v. O'Connor, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

193 Treat v. Riley, 35 Cal. 129, 132. To same effect, Calanchini v.

The reasoning in support of the proposition that error in excluding the testimony of a witness is cured by permitting another witness to testify to the same fact is technical, and is merely the statement of a theory—namely, that the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury or treason, and is not very convincing or satisfactory. But it is obvious that, notwithstanding the technical correctness of the theory, the testimony of two or more witnesses to an important fact is far better than that of a less number. It is clear, however, that, in cases like those above cited, the error is cured, as it also is in a case where improper evidence is admitted as to oral negotiations of

Branstetter, 96 Cal. 612, 31 Pac. 575; Hogan v. Cowell, 73 Cal. 211, 14 Pac. 780; People v. Marseiler, 70 Cal. 98, 11 Pac. 503, where error obviated by admission; People v. Keith, 50 Cal. 137, where the objecting party subsequently testified to same facts; Camp v. Simon, 23 Utah, 56, 63 Pac. 332, admission in pleading contrary to the evidence; Ramage v. Littlejohn, 17 Wash. 386, 49 Pac. 486. In the first case the court said: "So, also, if it be conceded that the evidence of Treat, relative to an action commenced by Riley should have been stricken out, no injury could have resulted from the refusal to strike out, for the defendants themselves, in a subsequent stage of the proceedings, proved the same facts, and again, at another stage it was conceded by the counsel of both parties that said suit had been instituted." In Calanchini v. Branstetter, supra, the court said: "On the trial of the cause, the plaintiff offered in evidence the judgment-roll in the case of Branstetter v. Calanchini for the purpose of proving the oral agreement alleged in his complaint. The defendant objected to the introduction of this evidence, as incompetent, for certain reasons represented by him at length, and now assigns as error the action of the court in overruling his objections. The ruling of the court upon the offer of this evidence was erroneous, but as the defendant himself afterward offered the same judgment-roll in evidence as a bar to the present action, he waived the right to question the action of the court in previously admitting it." In Hogan v. Cowell, supra, the court said: "Appellant assigns as error the admission of testimony showing that respondent's vendors offered the horses to certain creditors other than the respondent, and the refusal of such creditors to take them. That testimony, however, tended to show only that in the sale to respondent there was no actual fraud or intent to defraud; and as appellant admitted expressly at the trial that there was no actual fraud, and that he relied solely on the constructive fraud which arose from deficient delivery and possession, we do not see how he could have been injured by such testimony."

the parties, and subsequently a written contract covering the same is placed in evidence, and controls the decision.[194] But it is not uniformly held that the fact that other unobjectionable evidence was before the court or jury sufficient to support the finding or verdict is an answer to the showing of error in the admission of evidence tending directly to influence the court or jury, in reaching a decision. In Estate of James,[195] the court said: "It is first contended, upon the part of the

194 Jones v. Tallant, 90 Cal. 386, 27 Pac. 305; Stewart v. Gregory, 9 N. Dak. 618, 84 N. W. 553. See, also, State v. Sally, 41 Or. 366, 70 Pac. 396, holding that error in admitting testimony as to marks on a stolen article is harmless where the thing itself is before the jury. Where a judgment against the indorsers of a note is based upon the proposition that notice of nonpayment was waived by the contract of indorsement, an error in the admission of proof of a waiver of notice by subsequent acts is not prejudicial: Loveday v. Anderson, 18 Wash. 322, 51 Pac. 463.

195 124 Cal. 653, 655, 57 Pac. 578, 1008. To same effect, Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Anaconda Copper Min. Co. v. Heinze (Mont.), 69 Pac. 909; Townley v. Oregon Ry. etc. Co., 33 Or. 323, 54 Pac. 150. In Smith v. Westerfield, supra, the court said: "We cannot agree with the respondents that, inasmuch as other witnesses testified to the same fact, this was an immaterial error. One of the issues presented for trial in the case, and which was sharply contested on both sides, was, whether the name of the plaintiffs' father was 'Westfield' or 'Westerfield.' The respondents alleged in their answer that the true name of the plaintiff's father was Charles Westfield, and the court found that the plaintiffs are the 'issue of Charles Westfield and Mary Westfield, his wife.' It was for the purpose of establishing this fact that the defendants issued the commission to take the testimony of the witnesses at Cincinnati. This is not a case where an incidental and collateral fact which may not be seriously contested has been shown by incompetent evidence, but the testimony of the witness bore directly upon the main point in issue. In such a case, all the evidence upon that point becomes material, and the introduction of any incompetent testimony is presumed to cause an injury to the opposite party. We cannot determine the weight which the court below gave to the testimony of this witness in reaching its conclusion upon this controverted point. If the respondents believe that this testimony of the witness was unnecessary for the purpose of establishing their case, they should have declined to introduce it after the objection had been made thereto. They cannot now, after insisting upon a ruling in their favor and introducing the testimony, say that the error was harmless."

respondents, that there is sufficient evidence in the record, which came before the court without objection, to support the findings of fact, and that, therefore, even conceding the admission of evidence under objection, which should have been denied admission, still a new trial for the aforesaid reasons should not be ordered. This position cannot be sustained. If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of facts. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted, which upon its face tends in any degree to affect the final conclusion of the court." Another instance in which the error was not cured and the rule before stated held inapplicable, appears in an Oregon case,[196] where the court said: "Counsel for the plaintiff, however, contends that the error in the admission of this evidence was harmless, because witnesses were subsequently called by the defendant who were admittedly competent to testify on the subject of the value of some of the articles destroyed and injured by the fire, and did so testify. As a general proposition, a judgment will not be reversed on account of the improper admission of testimony if the facts sought to be thus proved were clearly established by other evidence, so that it can be seen that the party complaining was not prejudiced by the admission of such testimony, and that the verdict must have been the same if it had not been admitted. But there is no room here for the application of this rule, because the verdict is for a gross sum, made up of sundry items of damages, and there is no way of determining from the record by what evidence the jury were influenced in arriving at their verdict. The repeated rulings of the trial court that plaintiff's testimony was competent, and its refusal to withdraw it from the jury, clearly authorized them to consider it as proper testimony in the case, bearing on the question of damages, and the verdict affords no evidence of the basis upon which the jury arrived at the amount

196 Townley v. Oregon R. R. Co., 33 Or. 323, 329, 34 Pac. 150.

of damages. Under such circumstances the court cannot say that the error was harmless."

By comparing these decisions and expressions with others, herein cited, it is seen how impossible it is to state a uniform rule on this subject. The appellate court forms its opinion in each case, after giving consideration to the situation of the parties, the main features of the case, and the character of the error, as shown by the record, just as was stated previously in this section; just as the trial court might do on motion for new trial.

A distinction is made, however, in some jurisdictions, between cases tried by the court without a jury and those tried by jury. Thus, in Montana, it is held that, on trial before the court, inadmissible, but important, evidence received over objection will be presumed to have been disregarded by the court, and the error is presumptively harmless.[197]

In Marstellar v. Leavitt,[198] the court resorts to a somewhat novel test for determining whether an erroneous ruling upon an offer of evidence be prejudicial or harmless, and, if the decision were intended to supersede previous decisions on the question, it would overrule and antiquate a large percentage of all the decisions of the court since it was established. The court said: "The fact alone that the court admitted the evidence after objection made is the strongest kind of an indication that the court deemed it material, and, so deeming it gave it weight in making the judgment in the case. Indeed, it is impossible for this court to say that this evidence had no effect upon the mind of the trial court in pointing the judgment." And the court cites with approval Storch v. McCain,[199] where the court said: "The overruling of the objection to admitting it on the ground that it was irrelevant and immaterial indicates that in the opinion of the court it was relevant and material. That

197 Cobban v. Hecklen (Mont.), 70 Pac. 805. See, also, Montana Ore Purchasing Co. v. Butte etc. Consol. Min. Co., 25 Mont. 427, 65 Pac. 420; Ogden State Bank v. Barker, 12 Utah, 13, 40 Pac. 765. On a trial in equity, the admission of evidence bearing on a question which the court finally holds cannot be determined in the action is without prejudice: Carl v. West Aberdeen Land etc. Co., 13 Wash. 616, 43 Pac. 890.

198 130 Cal. 149, 152, 62 Pac. 384.

199 85 Cal. 308, 24 Pac. 639.

the court attached some importance to this evidence we are bound to presume from his admitting it against the objection made to it." These views are to the effect that the question of materiality is to be determined by the bare act of the trial judge, ignoring the law of evidence as a test.

Error in admitting evidence may be cured by striking out the evidence erroneously admitted,[200] or instructing the jury to disregard it, or to exclude it in their deliberations upon a verdict.[201] But to accomplish the result by instruction, it must unequivocally exclude the evidence from the consideration of the jury. In a case where the court had erroneously refused to strike out hearsay testimony, obviously prejudicial to the defendant,[202] the trial judge had, at the close of the evidence, instructed the jury as follows: "Some evidence has been admitted of a statement made by one Moore, at the restaurant of a Mr. Guthrie, immediately after the shooting; but in this connection I say to you that the defendant at the bar is not bound by anything Moore may have said, not in his presence and hearing." Of this the court said: "This was not equivalent to excluding this evidence from the consideration of the jury. It was not a plain and unequivocal direction to them to wholly disregard it as illegal, and not proper to be considered at all, and, therefore, cannot be regarded as obviating the error in the previous ruling of the court." A comparison of the cases of Livermore v. Stine,[202a] and Sapenfield v. Main St. etc. R. R. Co.,[203] will

200 Banning v. Marleau, 133 Cal. 485, 65 Pac. 464; People v. Goodwin, 132 Cal. 368, 64 Pac. 561; Brown v. Pierce County, 28 Wash. 345, 68 Pac. 872. When the court reserves its ruling on an objection to evidence, and afterward, on final hearing, rejects it, this is in effect sustaining the objection, and there is no error: Roper v. McFadden, 48 Cal. 346. And the same is true where, although proper evidence is excluded, and the court finds the fact which it was offered to prove: Garwood v. Wood, 34 Cal. 248.

201 Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145; Renton v. Monnier, 77 Cal. 449, 19 Pac. 820.

202 People v. Wallace, 89 Cal. 158, 167, 26 Pac. 650; Howland v. Oakland etc. St. Ry. Co., 115 Cal. 487, 47 Pac. 255; Kneeland v. Great Western etc. Co., 9 N. Dak. 49, 81 N. W. 67; State v. Aiken, 41 Or. 294, 69 Pac. 683; Nelson v. Spears, 16 Mont. 351, 40 Pac. 786; Comegys v. American Lumber Co., 8 Wash. 661, 36 Pac. 1087.

202a 43 Cal. 274, 278.

203 91 Cal. 48, 59, 27 Pac. 590. See, also, Brown v. McAllister, 39 Cal. 573; Chidesler v. Ditch Co., 53 Cal. 56.

show when a defective instruction is cured by a subsequent correct one, and when not. In the first case, the court said: "The second instruction, given at the instance of the defendant, is somewhat open to criticism, in the respect that the question of the authority of George B. Chester to enter into the contract was not adverted to in that instruction; but in the first instruction given, upon request of the plaintiffs, the jury were distinctly told, 'that, in order to bind the plaintiffs by such contract, it must be shown that the plaintiffs assented thereto, or authorized George Chester to made such a contract in order to bind the plaintiffs thereby.' In view of this distinct enunciation upon the point the jury could hardly have been mislead by the omission occurring in the other instruction." In the second case, the court said: "The error in giving the foregoing instructions was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict." It will be seen that in the first case there is no conflict, but only the curing of a defect by the second instruction, while in the second case, notwithstanding the giving of the correct instruction, the error of inconsistency remained. And it will be found that, in most such cases, it is impossible to reconcile the conflict and obviate the error.[204]

A distinction is made, with respect to the cure of error, between admitting and afterward excluding evidence, and excluding and afterward admitting it. In the former case the error of admitting evidence prejudicial to a defendant in a criminal case to go to the jury will be sometimes considered prejudicial, though afterward stricken out by the court, or excluded by an instruction; but no prejudice can result from

204 See People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; People v. Anderson, 44 Cal. 65; Chidester v. Con. P. Ditch Co., 53 Cal. 56.

the exclusion of evidence offered for the defendant where the court subsequently reverses its ruling and admits it.[205]

Cases are occasionally found in which errors offset each other, thereby avoiding a reversal. Thus, it was held in an election contest, that error in refusing to count a ballot for one of the contestants was harmless, where another ballot, for the other contestant, was rejected for the same reason.[206]

§ 690. Scope of investigation in cases of judgment by default.

An exception has been made in applying the distinction between a complaint defectively stating a cause of action and one regularly stating a defective cause of action, where the judgment was entered by default. Some courts hold that any defect in the complaint, which would have been available as a ground of demurrer before judgment, may be taken advantage of, on appeal after judgment by default, the reason assigned being that the presumption that such defects were supplied or removed by evidence, and that the defect was cured by the verdict, is absent, there having been no trial.[207] There is a dicta in an early California case[208] to the same effect. The case, however, is clearly within the general rule, inasmuch as there was not merely defectiveness of pleading, but a substantive insufficiency. There is reasonableness in the distinction, however, since there can be no intendments based on potentialities which are essentiallly excluded. In two later California cases, the earlier case was cited as authority. But in these, as in the earlier case, the defects of the complaint were substantive, and not merely such as could only be reached by a demurrer.[209] In the later case the court gave as a reason for the reversal that "these allegations are not a defective statement of a cause of

205 People v. Wong Ching, 117 Cal. 624, 49 Pac. 833.

206 State v. Peter, 21 Wash. 243, 57 Pac. 814.

207 See Old v. Mohler, 122 Ind. 598, 23 N. E. 967; Territory v. Virginia Road Co., 2 Mont. 101; Arkansas etc. Co. v. Nelson, 4 Colo. App. 440, 36 Pac. 307; Schwab v. Tucker, 10 Utah, 135, 37 Pac. 249.

208 Abbe v. Marr, 14 Cal. 210.

209 See Choynski v. Cohen, 39 Cal. 502, 2 Am. Rep. 476; Hannon v. Ashmead, 60 Cal. 441, 442.

action; on the contrary, they are a perfect statement of a defective cause of action, and a defective cause of action is not cured by failure to answer or by verdict."[210] Thus, it is seen that the court used the same expression with reference to a default judgment as it had so often applied to litigated cases. In Halleck v. Jourdin,[211] it was held, however; that no distinction exists between judgments by default and others, as to the class of errors for which they will be reversed by the supreme court on appeal. The rule, in every case, was declared to be that the judgment will not be reversed for such defects in the complaint as fall short of an entire want of something which is material to the plaintiff's right to recover.

§ 691. Limitation by "law of the case."

A decision of an appellate court must be adhered to at all future stages of the same case, unless overruled by a higher appellate court. This rule applies both to the trial court and the appellate court, and is not affected by any error which may be imputed to or found in the decision. In other words, it is the law of that case.

It is a rule, not peculiar to any appellate court, but prevails generally.[212] The proposition just stated is subject to the

210 Hannon v. Ashmead, 60 Cal. 439, 442.

211 34 Cal. 167. See Scottish Am. Mtg. Co. v. Reeve, 7 N. Dak. 99, 72 N. W. 1088.

212 See Kent v. San Francisco Sav. Union, 130 Cal. 400, 62 Pac. 620; Parker v. Bernal, 68 Cal. 122, 8 Pac. 696; Creighton v. Hershfield, 2 Mont. 169, 170; Yellowstone Nat. Bank v. Gagnon, 25 Mont. 268, 64 Pac. 664; O'Rourke v. Schultz, 23 Mont. 285, 58 Pac. 712; Union Trust Co. v. Atchison T. & S. F. R. Co., 8 N. Mex. 159, 42 Pac. 89; Wright v. Carson Water Co., 22 Nev. 304, 39 Pac. 872; Scottish Am. Mtge. Co. v. Reeve, 7 N. Dak. 552, 75 N. W. 910; Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405; Tandemp v. Hansen, 8 S. Dak. 375, 66 N. W. 1075; Brim v. Jones, 13 Utah, 440, 45 Pac. 46, 352; First National Bank v. Lewis, 13 Utah, 507, 45 Pac. 890; Dennis v. Kass, 13 Wash. 137, 42 Pac. 540; Tibbals v. Mt. Olympus Water Co., 16 Wash. 480, 48 Pac. 236; Smith v. Seattle (City of), 20 Wash. 613, 56 Pac. 389. But see United States v. Elliott, 12 Utah, 119, 41 Pac. 720, holding that court may, on a second appeal, reverse its former decision, where injustice will be done, not only in the particular case, but in other cases; also, Post v. Spokane (City of), 28 Wash. 701, 69 Pac. 371,

qualification that in order that a decision may become the law of the case, it must be rendered by the court of last resort in that class of cases; and the supreme court of a territory, not being the court of last resort in cases involving a sum in excess of $5,000, a decision on a former appeal in such a cause is not binding as the law of the cause.[213] In California it has been often announced. In Dewey v. Gray,[214] it had been decided upon a previous appeal that the entry of a landlord upon his tenant's premises, without his consent, during the lease, and reletting them, was a discharge of the tenant from his covenants, except as to such part of the rent as had accrued at the time of the re-entry, which the landlord was entitled to recover. Upon a second appeal in the same case, it was held that although the exception was an abrogation of one of the plainest principles of law, that, if the case were new, the court would overrule it, yet the previous decision was conclusive of the rights of the parties, and was not subject to revision. So, in Lassing v. Paige,[215] the court, speaking of its decision upon a prior appeal in the same case, said: "That decision, when made, became the law of this case, and was binding upon the court below, as it is upon this court, in this case."

A decision of the appellate court, though it may be disregarded and overruled in other cases, yet is not to be cited as mere authority in subsequent proceedings in that case. In the case in which it is made, it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.[216]

The rule applies, though the question be one of jurisdiction. The first point decided by any court, although it may not be

1104, holding that the supreme court of Washington may, on a satisfactory showing being made to it, grant leave to attack a judgment which has been affirmed by that court.

213 Jung v. Reed, 12 Utah, 196, 42 Pac. 292.

214 2 Cal. 374. See, also, Sherman v. Port Huron etc. Co., 13 S. Dak. 95, 82 N. W. 413, holding that, though opinion on a first appeal be erroneous, it will be adhered to on second appeal in same case.

215 56 Cal. 139, 142.

216 Davidson v. Dallas, 15 Cal. 75; Phelan v. San Francisco, 20 Cal. 40; Jaffe v. Skae, 48 Cal. 543.

in terms, is that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties.[217] Nor does the public importance of the question warrant an exception to the rule. In Leese v. Clark,[218] it was contended that the rule should not be extended to cases embracing questions of a public nature, where great interests were involved. But the court said: "That the doctrine does not extend to cases involving questions of a public nature is asserted, on the ground that the decision of such questions is not confined to the parties immediately before the court, but may affect vast interests of others. It is difficult to perceive how the inconclusiveness of a prior decision in the same case can be said to follow from the importance of the questions involved, or the interests which other parties may have in their determination. The importance of the questions involved should induce careful consideration in the first instance, but can have no effect upon the conclusiveness of the decision when made." In the same case the reasons for the rule were thus stated: "The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and obligations of the private parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration; whether right or wrong it has become the law of the case." But other reasons are not wanting. In all questions of remedy, where the opinions of judges may be as various as the differences of the human mind admit of, the interposition of a new judge might change the law which has been settled by a majority for years, and introduce a new rule. Cases which have been brought to the court on certiorari, or writ of error, and determined, may be reopened, and rights which have grown up under them be disturbed. The evil may extend to practice and pleadings in the inferior courts, and the whole administration of justice thrown into doubt and confusion by every change on the bench,

217 Clary v. Hoagland, 6 Cal. 685; Washington Bridge Co. v. Stewart, 3 How. (U. S.) 413.

218 20 Cal. 388, 428.

but by letting those judgments stand which have already passed through the appellate court, no inconvenience can result, as new rules will only operate upon future and not upon past controversies.

But the rule is based upon the supposition that the facts of the case in which it is invoked, or urged, are the same as upon the former decision. And where a new trial is had in a case, and the evidence upon the retrial establishes a new state of facts, while the legal principle may be the same as before, it is no longer applicable.[219] But where an order limiting the scope of a new trial is affirmed, its correctness in the individual case is established.[220]

Recitals of fact in an opinion cannot be used as an estoppel against a party under the rule. It is the facts themselves to which the legal principle applies and not any recital of them. Facts are stated in an opinion solely that the course of reasoning adopted by the court and the principles enunciated may be the better understood.[221] The appellate court does not assume to find the facts in a case, for it has no authority to do so, except in cases where an ultimate result follows as a conclusion of law from the proof of facts. And, if the appellate court should incorrectly state the facts of a case, such statement would in no manner control the court below, nor prejudice the parties upon a new trial.[222]

219 Mitchell v. Davis, 23 Cal. 381; Sneed v. Osborne, 25 Cal. 619, 628; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Pearce v. Baggs, 99 Cal. 340, 33 Pac. 906; Maddox v. Tague, 18 Mont. 512, 46 Pac. 535; Wright v. Carson Water Co., 23 Nev. 39, 42 Pac. 196; Robinson v. Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; Hughes v. Bravinder, 14 Wash. 304, 44 Pac. 530.

220 Duff v. Duff, 101 Cal. 1, 35 Pac. 437.

221 See Potter v. Ajax Min. Co., 22 Utah, 273, 61 Pac. 999, holding that while as a general rule, a previous ruling and decision by an appellate court upon questions arising in a case before it is a final adjudication of those questions in that suit upon the same state of facts, from the consequences of which the court will not depart in a subsequent appeal, yet the rule does not apply to the argument, or to expressions or illustrations in the argument that are obiter. To same effect; Estate of Johnson, 98 Cal. 531, 33 Pac. 460; Pacific Coast Biscuit Co. v. Dugger (Or.), 70 Pac. 523; Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

222 Sneed v. Osborne, 25 Cal. 619, 629.

The rule usually has reference to legal principles purely, but if the appellate court has upon one appeal decided that the evidence was insufficient to support a verdict or other decision, and substantially the same evidence and the same decision come before it again, it will adhere to its former ruling. Thus, in Lassing v. Paige,[223] the court, after stating that but for its prior decision it might incline to a different view, said: "But it is unnecessary to dwell further upon that matter or to notice the other points discussed by counsel. This court having previously decided that the plaintiff cannot recover upon the merits, as presented by his own testimony, the judgment and order of the court below must be reversed." And where, upon an appeal, the court has reversed a judgment for defendant upon the ground that uncontradicted evidence for plaintiff entitled him to judgment, and the case comes up again on appeal from another judgment for the defendant, the judgment will be reversed, pursuant to this rule.[224]

The rule as thus stated in the opinions has been often applied.[225] The case may be changed however, not only by different evidence, necessitating new findings, but the issues may be changed by amendment of the pleadings.[226] But a case cannot be so changed as to get rid of the rule by merely formal amendments.

The applicability of the rule cannot be evaded on the ground that some of the facts or issues were not adverted to in the opinion on the former appeal. A decision rests upon all the facts in the case, and it must be presumed for the purposes of this rule that all were considered in reaching it.[227]

223 56 Cal. 139, 142. To same effect, Polack v. McGrath, 38 Cal. 666; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Furth v. Snell, 13 Wash. 660, 43 Pac. 935.

224 Jaffe v. Skae, 48 Cal. 540. See, also, Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113.

225 See Kile v. Tubbs, 32 Cal. 333, 338; Page v. Fowler, 37 Cal. 105; Yates v. Smith, 40 Cal. 670; Poorman v. Mills, 43 Cal. 324; Lick v. Diaz, 44 Cal. 479; Stone v. Bumpus, 46 Cal. 221; Jaffe v. Skae, 48 Cal. 543; Thompson v. Felton, 54 Cal. 555; Lassing v. Paige, 56 Cal. 142; Hamlin v. Martin, 59 Cal. 181; Sharpstein v. Friedlander, 63 Cal. 78.

226 Phelan v. San Francisco, 9 Cal. 16.

227 Mulford v. Estudilla, 32 Cal. 137.

The rule does not apply so as to bind a party as to mere dicta in the opinion on a former appeal. In Trinity County v. McCammon,[228] a petition was presented, after the decision, asking for a modification of the opinion, on the ground that the opinion, was to some extent obiter, and on the further ground that the court had misapprehended the contents of a certain report made by a committee appointed by a county judge. In denying the petition, the court said: "In so far as the opinion passes upon any question not necessary to the decision of the appeal, it will interpose no obstacle to a reinvestigation of such question upon its merits in any case that may hereafter come to this court in which the point shall be directly presented. In so far as the misapprehension of the contents of the committee's report is concerned, the document, as such was not in the transcript, and we were therefore justified in assuming that it had no contents, aliunde the contents set out in the proceedings. Any case coming here hereafter showing that the report comprehended topics other than those to which the present record confines it, will be a case, to that extent, different from the present, and of course one to which the opinion in this case cannot be considered as having any just application." In other words, the law upon a question does not become settled as the law of a case by a mere opinion of the judge, unnecessarily expressed, but only by a decision of the point where the ground, or at least one of the grounds, of a judgment.

Where, in the opinion on a former appeal, the court said that they would treat only those points which appellant had taken up on his oral argument, and closed with the remark that, "we have considered and treated all the errors assigned which we consider material," it was held that such decision should not be deemed as determining any questions in the case other than those discussed in the opinion.[229]

228 25 Cal. 117, 121. To same effect, State v. McGlynn, 20 Cal. 234, 276, 81 Am. Dec. 118; Oakland v. Carpentier, 21 Cal. 642, 668.

229 Sweeney v. Montana Cent. Ry. Co., 25 Mont. 543, 65 Pac. 912. See, also, Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 Pac. 9, holding that on a second appeal the appellate court is bound by a former decision on points necessarily determined, but on matters not essential, or questions not considered, it is not bound.

Another feature of the rule is that when a decision has become the law of the case, it must be accepted with all its qualifications, and not in any narrow or restricted sense.[230]

Facts may, however, be presented in such a way that, though their consideration be not essential to the decision made, yet the decision actually made upon them becomes the law of the case as to them at all future stages. Thus, if facts are in the record, are argued by counsel, and are likely to arise upon a retrial, where the court decides the law applicable to such facts, its declarations are not mere dicta, but become of the law of the case. Accordingly, in Table Mountain Co. v. Stranahan,[231] the court said: "The counsel for the plaintiff contends that the point was not involved in the questions raised on the former appeal, and that so much of the language used as limits a location in the case put to the extent of the actual occupation, was mere obiter. It is true, perhaps, that an opinion on the point was not essential to the decision of the case; but it was important for the purpose of a new trial; and it was in that view that we considered the matter and passed upon it. It was a matter necessarily involved in the issue to be tried, and the principle of res judicata is undoubtedly applicable to its determination."

It seems that where a party upon a former appeal has requested a decision upon a point involved, though not absolutely essential to a determination of the whole case as presented, the decision thereon becomes a part of the law of the case, at least to the extent of estopping that party from subsequently claiming that it was dicta.[232]

Where the decision rests upon two distinct grounds, discussed and passed upon by the court, it is the law of the case upon either, if made the basis of contention and decision upon another appeal.[233] In Clary v. Rolland, [234] the court said: "The court fully considered the question and decided it, sustaining

230 Mulford v. Estudillo, 32 Cal. 131, 137.

231 21 Cal. 548, 552, To same effect, Olney v. Sawyer, 54 Cal. 379, 384. See, also, Taylor v. Gale, 24 Wash. 336, 64 Pac. 533.

232 San Francisco v. Spring Valley Water Works, 53 Cal. 608, 611.

233 Clary v. Rolland, 24 Cal. 148, 150; Cannon v. Kentfield, 57 Cal. 550, 553; Olney v. Sawyer, 54 Cal. 379, 384, 94 Am. Dec. 722.

234 24 Cal. 148, 150.

the point made. One other point made by the appellant was decided by the court in his favor, and the reversal of the judgment of the court below was placed on both grounds. It is insisted by respondent that, because there was another point decided upon which the reversal was correct, the decision on that point is merely dictum. But we might just as well treat the decision on the other point as dictum. The appellant directly made and relied upon both points, the court considered and decided upon both, and devoted much the larger share of the opinion to the discussion of the point now before the court. The opinion closes with these words: 'For these reasons we think the judgment of the court below ought to be reversed.'"

The rule against the investigation of questions of fact by the appellate court does not stand in the way of its investigating the record on a former appeal to determine what was decided, where the rule under consideration is invoked or sought to be applied. But if upon such inspection, it is found that the records do not present the same questions, upon substantially the same facts, the prior record cannot be added to, and read as part of the record, on the pending appeal.[235] This rule can only be given effect by appellate courts. The decisions of trial courts do not constitute the law of the case. And, if at the trial in a nisi prius court, the court makes a ruling upon a certain point, the court is not bound by it, if the same point arises again. On the contrary, the court may, change its ruling if, in the meantime, it has become satisfied that it was erroneous.[236]

Though upon a retrial the law as declared upon a previous appeal should be disregarded, it constitutes error merely. The judgment is not void. And after judgment entered by the trial court under the direction of the supreme court given upon a first appeal, a second appeal may be taken therefrom, not only to review the question whether the judgment was entered in conformity with the mandate of the higher court, but also to review the merits set forth in a bill of exceptions which was not involved upon the first appeal.[237]

235 McKinlay v. Tuttle, 42 Cal. 570, 576.

236 Lawrence v. Ballard, 37 Cal. 518, 521.

237 See Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69. Second appeal taken and prior decision affirmed in Fox v. Hale etc. Min.

Of course the law governing the case, may, within certain limitations, be changed by the legislature, after the trial below, or even between a first and a second appeal. And if a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its later decision is rendered.[238]

§ 692. Limitation resulting from doctrine of stare decisis.

This doctrine is necessarily limited in its operation to the courts of the same state. It is a rule of special and limited application, and is, by the courts of almost every state, adhered to with less strictness than formerly. It is upheld, principally, in order to leave undisturbed rights which have become vested under former decisions, upon the same state of facts. The rule, where held to apply, does not depend upon the correctness or incorrectness of precedents, but is sustained upon the theory that, where property rights have grown up under former decisions the rule established by them, is itself of more importance than the reasons upon which it rests. The rule has been frequently applied in California, but perhaps not more frequently than in some other states. This rule, unquestionably, applies to cases where particular modes have been declared effectual for passing property, and where technical or formal objections to such modes are interposed, the effect of which objections would be to make a mere legal claim prevail over justice and right. But it is not so clear if two men claim property—one under a statute, and the other under a decision—that the man claiming under a wrong decision, which destroyed the good title under the statute, is entitled, as a matter of justice, to the property as against the first. Again, that this matter—the vesting of a right—is not the conclusive thing which gives effect to the principle, is seen in the fact that a single decision is not necessarily or usually held protected by this rule. This rule itself is stated in vaguer terms than almost any other principle of law. It is thus stated by Chancellor Kent:

Co., 122 Cal. 219, 54 Pac. 731. Compare above cases with Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855.

238 First Nat. Bank of San Luis Obispo v. Henderson, 101 Cal. 307, 35 Pac. 899.

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed unless it can be shown that the law was misunderstood or misapplied in that particular case."[239] The English courts, at one time adhered undeviatingly to precedents, until Lord Mansfield's time. Of him and his views on the subject Chancellor Kent said:[240] "Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet perhaps no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases, when they came in his way to impede the operation of his cultivated judgment." No better statement of the general purposes of the rule in its relation to a particular case is to be found than that made by Justice Wallace, after a reference to a prior decision of the same court in Smith v. McDonald,[241] as follows: "It is believed that the authority of that case, upon the point involved, has never been doubted or called in question until now. The construction which it gave to the statute, in the respect now under consideration, has since then been steadily adhered to by the courts—it has been relied upon by the profession in the examination of titles, and acted upon in the purchase and sale of real estate during the intervening period, now some eight years—and property interests of immense magnitude must be imperiled if it is to be overturned now. Under such circumstances it has arisen to the importance of a rule of property, and even though it were conclusively shown to have been, as an exposition of the statute it attempted to construe, incorrect at the outset, I think it, nevertheless, our duty to maintain it now, and not permit it to be disturbed. If its operation for eight years in

239 1 Kent's Commentaries, 476.

240 1 Kent's Commentaries, 476.

241 42 Cal. 484, 487. See, also, Winter v. Belmont Min. Co., 53 Cal. 428, 432; Vassault v. Austin, 36 Cal. 691, 696; Lent v. Shear, 26 Cal. 362, 366; Englund v. Lewis, 25 Cal. 337, 352.

practice has indeed shown it to have unnecessarily facilitated the despoliation of the estates of infants, it certainly is not for us to abrogate it for such reason. The legislature can make such change, if it be desirable, without the disturbance of titles and the destruction of individual rights, which invariably follow such a change when brought about by a judicial decision. When a rule, by which the title to real property is to be determined, has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should, itself, be constant and invariable. We should not disturb such a rule of property here, even though we be satisfied that we could substitute another preferable in theory or better calculated by its operation to promote the purposes of justice."

That the courts have shown less and less disposition to give the rule any extensive force and effect, or to hesitate to repudiate error when clearly shown, is demonstrated by the ever increasing number of overruled cases, many of them having stood for a considerable period and having been extensively followed as precedents.[242]

The principle, under consideration is applied by all courts in matters of construction, procedure and practice. Thus in Morton v. Broderick,[243] it was held that the former constitution, having been judicially construed to empower the legislature to provide for appeals to the supreme court in special civil proceedings of a summary character, its language, reenacted in the present constitution, would be concluded to have been adopted with the interpretation and construction which the courts had enunciated, and that where the construction of the present constitution had been fixed by long acquiescence and sanction both of the legislature and of the courts in favor of

242 See Baker v. Butte City Water Co., 24 Mont. 113, 60 Pac. 817, denying rehearing; Baker v. Butte Cty. etc. Co., 24 Mont. 31, 60 Pac. 488, holding that where a motion to dismiss an appeal has been made for insufficiency of the appeal bond, the maxim "Communis error facit jus" does not apply, because a great many appeals during the past have been secured by undertakings equally as defective.

243 118 Cal. 474, 50 Pac. 644.

the right of appeal in special cases, it could not be open for decision to the contrary as a new question.

It has been often stated that the lower courts have no power to overrule the decisions of the higher courts of the same state.[244] As thus stated the proposition is undoubtedly correct. To overrule implies the power to control. But if the same proposition be stated in a little different form its unsoundness is apparent: No authority, however exalted, may

"Blazon evil deeds
Or consecrate a crime."

If the decision of the higher tribunal be correct, certainly neither the higher nor the lower tribunal may overrule it; but suppose it be clearly erroneous, would the higher court hesitate to affirm the decision of the lower court, notwithstanding its correctness, merely because it conflicted with its own prior decision, which upon subsequent consideration it found to be erroneous? Such an absurd proposition has never been advanced. Therefore the rule, if it be a rule, must be accepted in a narrow and restricted sense. The proposition just alluded to is on a par with the notion which once prevailed that none but the higher courts could declare a statute unconstitutional—that is to say, if an inferior court found so much printer's ink on the pages of a statute-book, spelling out a certain declaration, it was bound to declare that a part of the living enforceable law, though it, by reason of its conflict with the higher law, were as lifeless as last year's vegetation. But it is thought that both these ideas are so completely exploded as not to require further comment. The form of saying that a nisi prius court cannot overrule a decision of a court of last resort holds good under the rule of the "law of the case," but has no other application. But as thus applied, the nisi prius court is upon the same footing as the higher court, as shown in the last preceding section.

The rule of stare decisis, like the preceding, applies only to decisions proper, and not to mere dicta. However exalted the character and position of the judge who utters the dicta, his views, expressed obiter the direct line of reasoning leading up to the conclusion reached by the court, will be regarded in

244 See People v. Maguire, 45 Cal. 56.

other courts as of as little authoritative force as if he had given them expression merely as an individual, unconnected with the judicial tribunal. Accordingly in Banks v. Moreno,[245] the court said: "The statement of the proposition, therefore, must be regarded only as the dictum of the judge who wrote the opinion, and not as an adjudication of the court. It is well settled that, in construing judicial decisions, only that is held to be authoritatively decided which was necessarily involved in the decision of the cause; and whilst yielding a cheerful acquiescence in the decisions of the supreme court of the United States upon matters within his jurisdiction, we do not consider that we are bound by every isolated expression which may fall from the judge who delivered the opinion on points not necessarily involved in the adjudication of the cause. The clause quoted from Mr. Justice Grier is of that character, and however great our respect for the author of the opinion as a learned jurist, we do not accord to this expression in his opinion the force of an authoritative decision by the court." And the same may be said of points which are assumed for the purposes of a particular case, such being a species of dicta.[246]

On the other hand, and as under the preceding rule, a decision resting upon several points is authoritative upon each and all of them.[247]

245 39 Cal. 233, 238. See, also, Jolley v. Foltz, 34 Cal. 328; Chater v. San Francisco S. R. Co., 19 Cal. 245; Ulfender v. Levy, 9 Cal. 615.

246 Donner v. Palmer, 31 Cal. 500, 515.

247 Clary v. Rolland, 24 Cal. 147; Olney v. Sawyer, 54 Cal. 384; Camron v. Kenfield, 57 Cal. 554. In the second case the court said: "It is contended on behalf of the respondents that the rule as declared in Bornheimer v. Baldwin is an obiter dictum. We cannot so regard it. The question appears to have been made on the argument by the appellants, and urged as a reason why the judgment should not be allowed to stand, that the respondent (plaintiff below) based his right to recover on an immoral contract, under the terms of which contract the tenancy in common claimed by plaintiff was attempted to be made out. On a tenancy in common thus created, the appellants argued that a recovery should not be had, and as the judgment rested on such a tenancy in common, that it should be reversed. The court doubtless concluded, and properly concluded, that as the cause was to go to a new trial, it was proper to settle the law as to this question, which would arise on such new trial; and in reply to this position used this

§ 693. No limitation by reasoning of lower court.

It has been previously shown that the reasons advanced by the parties, in their contentions leading up to an act of the court, alleged on appeal to be erroneous, and the question whether they presented any argument whatever are matters of but little, if any, consequence. Practically, the same view is taken of any reasoning which the record may present as a foundation for the conclusion reached by the lower court. In other words, a correct decision will be upheld, however, erroneous the reasons assigned for its support; and an erroneous conclusion will be reversed however plausible, and self-satisfying the reasons advanced in its support by the trial judge.[248]

An opinion by the lower court has no place in the record on appeal. The California Practice Act of 1851 provided that any opinion given by the trial judge "on rendering the judgment or making the order" should be furnished to the supreme court upon the appeal. But upon the adoption of the Code of Civil Procedure, this provision was omitted. While in use as one of the papers to be presented on appeal it was freely resorted to for the purpose of determining the reasons upon which the lower court based the judgment, or order appealed from. But,

language at the close of the opinion: 'If the case of the plaintiff be otherwise established, the defendant cannot defeat it by the application of the maxim "En dolo malo non oritur actio," nor set up in his defense that both he and the plaintiff entered upon the premises wrongfully in the first instance. Upon well-settled principles, he cannot be permitted, if entered and remaining in possession as a tenant in common, to assail the common title or call its validity in question': Bornheimer v. Baldwin, 42 Cal. 34. We do not feel at liberty to disregard this decision."

248 Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738; Estate of Kingsley, 93 Cal. 576, 29 Pac. 244; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466; People v. Tapia, 131 Cal. 647, 63 Pac. 1001; Forrester v. Boston & M. Consol. Copper etc. Min. Co., 23 Mont. 122, 58 Pac. 40; State v. First Judicial District Court, 16 Mont. 274, 40 Pac. 600; Menard v. Montana Cent. Ry. Co., 22 Mont. 340, 56 Pac. 592; Reno Water etc. Co. v. Osburn, 25 Nev. 53, 56 Pac. 945; Lockhart v. Wills, 9 N. Mex. 344, 54 Pac. 336, judgment affirmed; Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. ed. 979; Tribune etc. Co. v. Barnes, 7 N. Dak. 591, 75 N. W. 904; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37; Brennen v. Front St. Cable Ry. Co., 8 Wash. 363, 36 Pac. 272.

no matter what its recitals, these could never be resorted to to supply deficiencies in, or to explain, matters set forth in the record proper.[249] And, when the reason assigned for refusing to give certain instructions was that they had not been presented according to a rule of court, that reason was ignored, and the court passed upon the correctness of the instructions, holding them erroneous, saying: "It is immaterial whether the reason for refusing the instructions, be good or not, as we do not try the sufficiency of the arguments of the judge, but only the soundness of his conclusions."[250] So in Coghill v. Marks,[251] the court said: "If there was nothing in the record upon which the order could be maintained, except the mistaken ground upon which the court put it, we could not do otherwise than reverse the order and affirm the judgment. But there are other grounds. . . . . It is urged that we have frequently decided that parties moving for new trials must be confined to the error assigned. But in that class of cases, if the specification does not include all the grounds of reversal embodied in the statement, the fault is that of the moving party. But where the court properly grants a new trial, but for a false reason, or grants it without exhausting the argument in favor of it, neither the mistake in the one case nor the omission in the other lies at the door of the party—and thus the analogy relied on fails." And in Chabot v. Tucker,[252] the court said: "The proper subjects of review in this court are the rulings and decisions of the district court, but not the reasons given for the rulings."

The subject of orders on motions for new trial, and their construction on appeal, was previously considered.[253] But grounds for the action of the court set forth in an order rest upon a different footing from mere reasoning found in the record. And where a motion to strike out evidence was granted, it was held that it must be presumed to have been stricken out on the

249 See Corcoran v. O'Keefe, 34 Cal. 557.

250 People v. Sears, 18 Cal. 635, 637.

251 29 Cal. 673, 677.

252 39 Cal. 434. To same effect, opinion by Currey, C. J., in Grant v. Moore, 29 Cal. 644, 648; Bolton v. Stewart, 29 Cal. 617; Thompson v. Felton, 54 Cal. 554.

253 See ante, § 399 et seq.

ground stated, and the ruling could not be sustained upon different ground, not stated.[254] And though the opinion of the trial court cannot be considered as any part of the case, yet where it is submitted by all the parties in their briefs, without objection, it may be read as suggestive of what may be the just determination of the case.[255]

§ 694. Scope of inquiry and decision cannot be enlarged by statute.

The inability of the legislature to curtail the jurisdiction of the supreme court has been already considered.[256] The deductions there made from the authorities are similar to the conclusions which must be reached with reference to legislation directing decisions on questions not necessarily involved, nor necessary to be determined, in order to dispose of a pending appeal. The code contains a provision that in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case."[257] Little attention has been paid to this provision. The court sometimes passes upon other than essential questions, but, in most cases, confines its attention to those which are vital to the appeal, as before explained.[258]

§ 695. Abortive legislative attempts to control herein.

Statutes are found in some of the states which attempt to limit the causes for reversal by appellate courts, and to prescribe for what kind or class of errors judgments may be set aside, or affected. It would be difficult, however, to discover any effect they have had upon the rules of decision governing such courts. In other words, appellate courts, where no such statutes are found, are controlled in their decisions by the same rules as where they exist. Prior to 1897 the California code, and

254 Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380.

255 Porter v. Industrial Printing Co., 26 Mont. 170, 66 Pac. 839, 67 Pac. 67.

256 See ante, §§ 462, 463.

257 Cal. Code Civ. Proc., § 53.

258 See ante, § 674.

prior thereto to the Practice Act, contained a provision that, "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings and proceedings which, in the opinion of said court, does not affect the substantial rights of the parties."[259] Courts had always carried out the principle embodied in the provision, and the statute cannot be said to have had any influence upon their decisions, though the supreme court often referred to the provision. In 1897, the following was added, by amendment to the section above quoted: "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction or defect, unless it shall appear from the record that such error, ruling, instruction, or defect, was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

In San Jose Ranch Co. v. San Jose L. & W. Co.,[260] the court

259 Cal. Code Civ. Proc., § 475.

260 126 Cal. 322, 58 Pac. 824. The opinion by Justice Temple in this case is too lengthy for entire insertion, but the following further quotation will show how unimportant the effect the amendment is likely to have upon future decisions. Quoting the amendment he said: "The 'substantial injury' and 'different result' mentioned must have reference to the final judgment. Ordinarily, we cannot ascertain or determine 'from the record' whether the appellant has suffered substantial injury, or whether a different final result would have been reached, had not some particular error been committed. If the court were erroneously to refuse to receive any evidence for a party, and should arbitrarily determine all issues against him, this court could not determine from the record whether he would have fared better if the evidence had been admitted. So if, in an ordinary action at law, a court were to erroneously deny a jury trial, the record could not disclose that a different result would have been probable if the error had not been committed, although it would plainly enough show that a party had been denied a trial according to the law of the land. A person against whom such a ruling has been made, and who has lost his case, has been deprived of life, liberty, or property without due process of law. And this amendment, if valid, would prevent a reversal of the cause upon

declared the added sentence unconstitutional and void, "unless some very restricted meaning can be given" to it. After giving its reasons at length, the opinion concludes with a declaration of the true rule, which is in no respect different from the old rule, as follows: "A litigant who has been denied a trial according to the law of the land has, in a legal sense, been aggrieved, but courts are not created for the redress of ideal wrongs, and, therefore, when from the record we can see that the injury is not substantial it is not such a grievance as courts will redress. We therefore say in such a case that the party complaining has not been injured. He is not an aggrieved party in such sense that he needs or can obtain a correction of the error. Further than this the courts should not go even if authorized by the legislature. How serious the departure from established rules must be to require a reversal is generally a judicial question."

that ground. That it might result in preventing the appellate courts from enforcing the fundamental right to a jury trial is not really of greater moment, perhaps not so much as the fact that it may prevent this court from enforcing uniformity in the administration of the law. Under this rule, any and all courts may refuse to be governed by the law of procedure and evidence, solemnly enacted, by the legislature, and, unless we can determine from the record, both that the party complaining has suffered substantial injury, and that a different result would have been probable if the law of procedure had been followed, there could be no reversal."

CHAPTER 41.

GENERAL MATTERS OF PRACTICE IN APPELLATE COURT.

§ 696. Oral argument.
§ 697. Points and authorities cannot be dispensed with.
§ 698. Duty of respondent to answer points.
§ 699. Appellant should make all his points in his opening brief.
§ 700. Points should not be reserved for petition for rehearing.
§ 701. Improper matter in briefs—How dealt with.
§ 702. Moot questions not decided.
§ 703. Form of rendering decisions.
§ 704. Succession of interest after appeal taken.
§ 705. Death of party before appeal taken—Before service of notice of motion for new trial.
§ 706. Succession in office.
§ 707. Effect of bankruptcy proceedings pending appeal.
§ 708. Stipulations in supreme court.
§ 709. Suspending rules of court by stipulation.
§ 710. Motions to strike out.

§ 696. Oral argument.

If the motion to dismiss be granted, that, of course, puts an end to that appellate proceeding. But any such motion having been denied and exceptions to the transcript disposed of, by being disallowed or defects supplied, the appeal stands for oral argument as the next step before the appellate court. No far-reaching consequence can result to either party from a failure to appear at the time set for the hearing. The rules, as before shown, authorize a dismissal for failure of the appellant to file and serve points and authorities; but no consequence is attached to a failure to appear and orally argue the case. Oral argument is a privilege which may be waived without prejudice (and sometimes profitably). The only rules on the subject are rule 4 with reference to arranging cases on the calen-

dar for argument, and rule 19 reading as follows: "No more than one counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel of each party to a case appealed shall be allowed only one hour, unless an extension of time be obtained from the court before the argument is commenced, and in an original proceeding such time as shall be fixed by the court before the commencement of the argument."

§ 697. Points and authorities cannot be dispensed with.

It has been already shown that the failure of the appellant to file points and authorities is a ground for dismissal of the appeal. But, whether the respondent resort to his motion or not, the court will not of its own accord "wade through" the transcript in search of some point, pretext or argument upon which to reverse or modify the judgment or order appealed from, but will, in a civil case, affirm it without investigation, if the appellant wholly neglects to file points and authorities.[1] The opinion in the case of Shain v. People's Lumber Co. [2] contains valuable suggestions and explanations of the respective rights of the parties and of the proper practice to be followed, from which it is seen (1) that the court has no discretion, at least without a suspension of the rule, to extend the time for more than twenty days and then only upon a stipulation or affidavit; (2) that the granting of an extension "of twenty days additional to the time allowed by the rule of the court" does not have the effect to extend the time twenty days from its date but

1 Brewster v. Johnson, 51 Cal. 222; Brown v. Lalles, 7 Cal. 399; Edmondson v. Alameda County, 24 Cal. 349; Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; West v. Crawford, 80 Cal. 19, 21 Pac. 1123. In the first of these cases the court said: "There was no oral argument of the cause, nor has either party filed points and authorities. We decline to perform the duty of counsel by examining the record to ascertain, if possibly, error may not have intervened in the court below. If an appellant omits to point out the errors of which he complains, the judgment will be affirmed without looking into the record." The failure to file the points and authorities as a ground for dismissal has been previously discussed: See chapter 39.

2 98 Cal. 120, 32 Pac. 878.

from the date when the rule requires the thing to be done; and (3) that the right to a dismissal attaches upon the giving and filing of the notice therefor, and cannot be defeated by filing points and authorities pending the motion. The opinion is in part as follows: "Rule 2 of this court requires the appellant to file with the clerk his printed points and authorities within thirty days after the filing of the transcript, and declares that the time so limited shall not be extended 'except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than twenty days'; and rule 5 provides that, if the points and authorities are not filed within the time prescribed, the appeal may be dismissed on motion upon notice given. For the purpose, therefore, of enabling the court to determine whether an order extending the time to file points and authorities should be granted, the proper practice for an attorney who would seek such additional time is to show by the affidavit upon which he asks for the order, the date when the transcript was filed, and whether any time in addition to that limited by the rule has been given, either by order or by stipulation, so that it may be determined therefrom whether it is within the discretion of the court to grant the time asked for. In the present case, the time provided by the stipulation, as well as that granted by the order, covered the same period of time, viz., twenty days in addition to the time allowed by the rules of the court, and expired on the ninth day of December. The notice of the motion to dismiss the appeal was not served until the 19th of December, and at that date, the respondent had the right, under rule 5, to a dismissal. The right of the respondent to have the appeal dismissed must be determined by the facts as they existed at the time that notice of the motion was given, and was not destroyed by the subsequent filing of points and authorities on the part of the appellant." In Edmondson v. Alameda County,[3] where the appellant failed to file a brief, the court said: "This court will not perform the duties of counsel; it will not examine a record to see if it can find any errors upon which to reverse a judgment. If the appellant's counsel does

3 24 Cal. 349. To same effect, Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567.

not choose, in some form, to call the attention of the court to the points, provisions of the statute, and the authorities upon which he relies for a reversal, the judgment will be affirmed."

Any suggestions on the general subject of brief making would be superfluous. A presentation of a few points decided by the courts, with reference to their essentials, is all that the occasion seems to require. These will be found in the appended note.[4]

In a few states—strange to say—legislatures have undertaken to prescribe the contents of briefs, and the courts to enforce such statutory provisions,[5] and in others, court rules go into details on the same subject.[6]

4 See Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Neylan v. Green, 82 Cal. 128, 23 Pac. 42; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445, holding points not made in brief treated as waived; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317, holding that where court merely asked generally to examine points, no authorities being cited or arguments advanced, they will be treated as unimportant, and the brief-maker is referred generally to the following authorities, as containing important suggestions: Dale v. Purvis, 78 Cal. 113, 20 Pac. 296; Boyd v. Oddous, 97 Cal. 510; 32 Pac. 569; Whyte v. Rosenkrantz, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436; Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882; Ranahan v. Gibbons, 23 Wash. 255, 62 Pac. 773; Times Printing Co. v. Seattle (City of), 25 Wash. 149, 64 Pac. 940; Cathcart v. Bryant, 28 Wash. 31, 68 Pac. 171; Main v. Main (Ariz.), 60 Pac. 888; Wiser v. Lawler (Ariz.), 62 Pac. 695; Reynolds v. Jackson, 33 Or. 422, 53 Pac. 1072. For form of affidavit to obtain extension of time, see Shain v. People's L. Co., 98 Cal. 120, 32 Pac. 878.

5 See Laws Wash. 1893, p. 127; Haugh v. Tacoma (City of), 12 Wash. 386, 41 Pac. 173, 43 Pac. 37; Doran v. Brown, 16 Wash. 703, 48 Pac. 251; Graton & Knight Mfg. Co. v. Redesheimer, 28 Wash. 370, 68 Pac. 879; Dunsmuir v. Port Angeles Gas, Water, Elec. L. & P. Co., 24 Wash. 104, 63 Pac. 1095. Brief need contain no reference to pages of the transcript where the case was disposed of on motion and demurrer to complaint, substance of both of which are contained in the brief: Sligh v. Shelton W. R. Co., 20 Wash. 16, 54 Pac. 763. A court not being required to state the grounds on which a demurrer to a cause of action or ground of defense is overruled, a single assignment of error, charging that the court erred in such ruling, is sufficient: Phelps v. City of Tacoma, 15 Wash. 367, 46 Pac. 400. A brief which fails to show whether the case was disposed of on the pleadings or on the evidence, or to state how the errors relied on for reversal arose, will be stricken out for noncompliance with Laws of 1893, page 127, sec-

§ 698. Duty of respondent to answer points.

The same reason for requiring the appellant to file his brief makes it the interest, though not an imperative duty, of the respondent to meet the points made therein, which refer, for their support, to matters contained in the transcript. He need pay no attention to propositions of law advanced by appellant which he regards as unsound or inapplicable; but if, by correct references to the record, the appellant makes prima facie cause for reversal, and the respondent fails, or is unable, to answer by calling attention to other portions or otherwise, a reversal will generally be ordered without further investigation than sufficient to verify the appellant's references. In Williston v. Perkins[7] the court said: "But the appellants claim, in their points on file, that there was no evidence whatever going to sustain the third finding, to the effect that, by the agreement of the parties, the demand sued for was to be paid in gold coin, and this was the first ground of their motion for a new trial in the court below. The case was submitted here without oral argument. The respondent, in his printed points, has not adverted to this position of the appellants. If there be in the voluminous record on file any evidence going to support the finding in the respect referred to, the respondent should have pointed it out. It is not our business to institute a search for it."

And while the appellant, in case of default of the respondent herein, is neither entitled to an affirmance nor an immediate

tion 15, requiring the brief to "clearly point out" errors: Haugh v. City of Tacoma, 12 Wash. 386, 43 Pac. 37, 41 Pac. 173. The supreme court rule which requires findings of fact to be printed in the appellant's brief applies only to cases where the findings themselves are contested, not to cases where the error assigned is as to the conclusions of law drawn from findings which are accepted as correct: In re Seattle, 26 Wash. 602, 67 Pac. 250. See Daggs v. Hoskins (Ariz.), 52 Pac. 350.

6 See Montana Supreme Court, rule 5; Rehberg v. Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; Washington Sup. Court, rule 8; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067. As to sufficiency of assignments of error under the above Montana rule, see Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969.

7 51 Cal. 555.

submission, yet he is entitled to have the case placed upon the submission calendar, provided for in rule 3, to be submitted in due course, when the business of the court will permit such submission.[8]

§ 699. Appellant should make all his points in his opening brief.

A proper regard for fairness to the respondent and the convenience of the court demands that the case for the appellant, in all its principal bearings, be presented in the opening brief. It is also to his interest to pursue this course, because, while a point vital to the case reserved for reply would usually receive consideration, yet that would depend upon circumstances, and there is always the danger that the court may overlook or ignore it. That the court reserves the right to ignore points first brought forward in reply is indicated by Sawyer, J., in Hihn v. Courtis,[9] where, in delivering the opinion denying a rehearing, he said: "In the appellant's opening argument of sixty printed pages, in which the real point made in the court below, and upon which appellant relied on appeal, is most thoroughly and ably discussed, and where the point now brought to our notice should have been made, if made at all, it was not raised, or in the remotest degree alluded to. Nor is it suggested anywhere in the record. Neither did the respondents, in their one hundred and ten printed pages of brief, allude to any such point. At the close of appellant's brief in reply, when the respondent had no opportunity to answer, the point is brought forward for the first time, either in the record or argument, and as an apology for presenting the point at all, which is virtually acknowledged to be without merit, it is stated that the respondent had not met them fairly on the merits, and they were forced into the position. The point thus presented did not escape our attention or consideration, although we might well have passed it by on those grounds alone." In Kahn v. Wilson,[10] where the appellant brought forth new points to sustain the appeal, the court made it very clear that

8 Hale & N. S. M. Co. v. Fox, 120 Cal. 261, 52 Pac. 499.

9 31 Cal. 399, 405.

10 120 Cal. 643, 53 Pac. 24.

such course constitutes an irregularity in the procedure which will not be tolerated, unless in exceptional cases, and for good cause shown. In the opinion, the court said: "Respondent objects to the consideration of these new points thus made; and we think that his objection is good, and that the said reply brief cannot be considered. We do not mean to say that an appellant might not be allowed, in exceptional cases, to discuss new questions in his final brief. He might be allowed to do so upon an application showing meritorious reasons why the points were not made in the opening brief. Such application might be based upon sickness, inadvertence, or other excusable neglect. But in the case at bar, no reason whatever is given for this departure from the ordinary method of presenting a case in this court. If the practice were allowed without any substantial reason, it would lead to great irregularity and delay. In such event, the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed." And a rule of practice permitting the filing of additional authorities at the final hearing does not permit of new points being then raised.[11] And in some cases, courts have gone even further

11 Sligh v. Shelton W. R. Co., 20 Wash. 16, 54 Pac. 763. In this case the court, in granting the motion to set aside the order granting a rehearing made on Monday, the thirtieth day being Sunday, said: "Whether, in the absence of other provisions of the code, and the constitution relating to this same subject, that would be so, it is not now necessary to decide, because the constitution declares that this court 'shall always be open for the transaction of business,' and the legislature when prescribing on what days courts may be held and judicial business transacted, provides 'that the supreme court shall always be open for the transaction of business,' and that provision is inserted among the exceptions to the general rule, that no court shall be open or transact any judicial business on Sunday: Code Civ. Proc., §§ 133, 134. It is therefore quite clear that this court might have been open for the transaction of business on the last of the thirty days within which an order that this case be heard in bank could be made, and there is no legal reason why it should not have acted on that day, and consequently no reason why the judgment of the department should not have become final at the expiration of that day. The court is not required to take any formal action in regard to a judgment pronounced by a department within thirty days there-

than to ignore the new points raised for the first time in a reply brief. Where the opening brief contained little more than a statement of the case, the effect being practically to impose upon respondents the burden of presenting the entire cause, it was held that an exhaustive reply brief, filed by appellants a short time before the argument should be stricken out, as unjust to respondents.[12] But where a party, at his own request, is permitted to present his side of the case on the day before the final hearing, he cannot complain of lack of notice of a supplemental brief filed at the final hearing, at which he was not present.[13]

§ 700. Points should not be reserved for petition for rehearing.

The parties may rest assured that, where a point is not presented at all, either in the briefs or in oral argument, a new investigation will not be instituted by the court upon petition for rehearing, for the purpose of determining whether a point raised in a petition for rehearing for the first time be well

after. The constitution simply limits the time within which an order that it be heard in bank may be made. The court may act or not as it chooses within that time, but it cannot, after the expiration of that time, order a cause to be heard in bank. But that the framers of the constitution did not intend that the law relating to holidays should apply to the supreme court is made apparent by a comparison of the clause of the constitution, which declares that the supreme court 'shall always be open for the transaction of business,' with the provision that the superior court 'shall be always open (legal holidays and nonjudicial days excepted).' The provision (Code Civ. Proc., § 12), of the code upon which appellant relies does not attempt to define what days shall be nonjudicial. But that is done in section 133, and as before stated, the supreme court is expressly excepted from its operation."

12 Vestal v. Morris, 11 Wash. 951, 39 Pac. 960.

13 Knight v. Hamaker, 33 Or. 154, 54 Pac. 659, denying rehearing, Knight v. Hamaker, 33 Or. 154, 54 Pac. 277. The supreme court rule (rule 8, subd. 5), which requires that, in all equity causes and actions at law tried by the court without a jury, the party appealing shall print in his brief the findings of fact, with exceptions thereto, and the requested findings, with the exceptions, in case any error shall be based thereon, is sufficiently complied with by the insertion of such matters in the reply brief: Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.

taken. And where the petition for rehearing alleged that a tax deed did not contain the necessary recitals, the court said: "In the opinion, we assume that the deed contained the proper recitals, because nothing had been alleged to the contrary, and no point of that kind was raised. The sufficiency of the deed, in this particular, not having been questioned at the argument or in the briefs of counsel, we decline to consider the point now. The proper dispatch of the business of the court requires that counsel should state the grounds on which they rely in their briefs, and not reserve other points to be set up in a petition for a rehearing, after a decision of all the cause." [14]

§ 701. Improper matter in briefs—How dealt with.

Counsel should not go outside the record to criticise or condemn conduct of a particular court or judge in a given case. Some courts have sought to enforce against members of the bar a stricter rule than that here stated, a rule which forbids any criticism whatever, except along the lines of legal argument. In attempting to preserve and command a high degree of respect for the judiciary, some courts have imperiled the same, deprived counsel of some of the high privilege belonging to the profession, the enjoyment and exercise of which are necessary to prevent contamination at the sources of administrative justice. If all fear of legitimate criticism is taken away, and the knaves who have crawled into judicial station on the superior bench thus made to feel secure against censure, or even legitimate criticism, the end of real liberty is not far off. The usurpations, perversions and corrupt practices in lower courts; the arbitrary suppressions of the truth, and falsifications in the preparation of records on appeal, sometimes designed to avoid reversals of judgments and orders which, upon a fair record, would not stand for a moment, and in other instances, inspired by even baser motives than mere selfish ambition and false pride, are matters which can seldom be shown in appellate courts under prevailing methods of appellate procedure. But where cause for criticism does appear in the record, the right to criticise, short of billingsgate and abusive epithet, should be unrestricted.[15]

14 Dougherty v. Henarie, 49 Cal. 686.

15 It is a well-known fact that many court reporters are the mere

Of course, from the nature of the case, it is impossible to draw a line at what will be considered improper criticism in a brief, or to state what course will be taken upon it appearing to the court that given matter is improper. Sometimes the court will strike out the offending brief,[16] in some instances permit the party presenting it to withdraw and reform it, in other cases let it pass with a censure in the opinion.[17] Courts have, in aggravated cases, even gone to the extreme of disbarment of the offending attorney. But, in order to authorize any adverse action for this cause, it must appear that the matter complained of is sham, frivolous, or impertinent, and necessitates prompt action to protect the dignity of the court.[18]

tools and implements of the superior judges; that the right to a true and correct record and transcription and incorporation thereof in the record on appeal is often denied to litigants. Also that the necessity for a transcription is generally a pretext for oppression and extortion. The supreme court has done much to perpetuate this dangerous system—often infamous and wicked in practice—by holding that the recollection of the judge is entitled to superior credibility to the reporter's notes, and the legislature has done still more by giving an unlimited power of abridgment and condensation to the trial judges. Then the supreme court gives so narrow a construction to the provisions for procuring the allowance of an exception at its hands as to amount, practically, to a denial of relief in that direction: See chapter 22. Legislatures having full power to regulate the procedure, should enact such measures as will place an impassable barrier against any change in the record after it is made, and should make court reporters absolutely independent of the judiciary, both with respect to their appointment and official functions.

16 See Nephi v. Vickers, 20 Utah, 310, 58 Pac. 36; Gage v. Gunther. 136 Cal. 340, 89 Am. St. Rep. 141, 68 Pac. 710; San Diego Water Co. v. San Diego (City of), 117 Cal. 556, 49 Pac. 582; Sawdey v. Spokane Falls etc. Ry. Co., 27 Wash. 536, 67 Pac. 1094.

17 See Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846.

18 White v. White (Or.), 50 Pac. 801. In this case the court said: "It is claimed on the part of the relators that said court had no jurisdiction, for two principal reasons: 1. That the justice's court had no jurisdiction, and for that reason the superior court could get no jurisdiction on appeal. . . . . As to the first contention the rule is well settled that if the court from which an appeal is taken had no jurisdiction of the subject matter, and for that reason its judgment was absolutely void, the appellate court by virtue of the appeal can get no jurisdiction to do more than to reverse the judgment, or dis-

A brief will not be stricken out on the ground that it misstates the facts and misrepresents the record. The court determines for itself, in considering the case, what the real facts are, from an examination of the record.[19]

§ 702. Moot questions not decided.

Matters for determination by appellate, as in other, courts must be presented in good faith, in the regular course of honest litigation, and must, as a rule, be necessary to be decided. It is no part of the duty of courts to investigate and decide questions not regularly arising, but presented merely for the gratification of the curiosity of counsel or others, or to serve some ulterior purpose of parties who choose to procure them to be raised against themselves by others who feel no interest in the contest. Thus, where an attorney induced the attorney for the opposite party in an action to object to his appearing as attorney upon a motion without a federal license, and, upon the objection being sustained, applied to the supreme court for a writ of mandate to compel the district judge to recognize his authority, the court denied the petition without passing upon the merits.[20]

miss the appeal. This rule is so well established that it is not necessary to cite authorities or make argument in support thereof."

19 Sawdey v. Spokane Falls etc. Ry. Co., 27 Wash. 536, 67 Pac. 1094.

20 People v. Pratt, 30 Cal. 224. In this case, after stating the facts, as they appeared from the record, the court in denying the application for a writ of mandate, proceeded as follows: "The record, as we view it, shows that the motion in the court below to exclude the relator was his own, but nominally made through the accommodating attorney of defendant for relator's own purposes, and that he got what he thus indirectly asked, although, it seems, not what he desired. Whether the question was argued in the court below by the attorney nominally making the motion, or not, does not appear. Certain it is, when the application for the peremptory writ was made in this court, there was no counsel who considered it to be his especial duty to resist the application, or argue the great and important constitutional question, supposed to be involved. It was not to be expected, it is true, that the respondent would go to the trouble and expense of employing counsel to argue a question which he had been called upon to decide judicially, only, and in which he had no personal interest, or that the counsel of the defendant in the court be-

§ 703. Form of rendering decisions.

The almost uniform practice of the California supreme court of giving written decisions with the reasons therefor, is referable to a constitutional provision requiring it.[21] Long prior to the incorporation of such a provision in the constitution, the court denied the power of the legislature to control by statute the method or form of rendering decisions. In Houston v. Williams,[22] an oral decision from the bench having been rendered, the respondent presented a petition for a written decision based on a provision of the Practice Act, as amended in 1854, that "all decisions given upon an appeal in any appellate court of this state, shall be given in writing, with the reason therefor, and, filed with the clerk of the court."[23] In denying the petition, Justice Field expressed views of the court, and announced principles, which have been often quoted in Cali-

low, who made the motion for the accommodation of the relator, would give himself any trouble about it. But this only shows the impropriety of raising for judicial determination questions of great importance in the manner presented in this case, where there is virtually but one party. It must happen generally in such cases, that there will be no interest manifested in the contest on one side, at least, and this court must decide the question as improvidently as it is presented, or assume the functions of counsel as well as of court. When questions are presented in good faith in the regular course of honest litigation and are necessary to the determination of the case, we shall not hesitate to decide them; but it is no part of our duty to investigate and decide questions not regularly arising in the due course of litigation, for the gratification of the curiosity of counsel, or to serve some ulterior purpose of parties who choose to procure them to be raised against themselves by others who feel no interest in the contest. We regard this as one of the latter class of cases."

21 Section 2, article 6, Constitution of 1879, reading in part as follows: "In the determination of causes, all decisions of the court, in bank or in departments, shall be given in writing, and the grounds of the decision shall be stated."

22 13 Cal. 24, 73 Am. Dec. 565. See, also, In re Jessup, 81 Cal. 408, 485, 21 Pac. 976, 22 Pac. 742, 1028; Vaughn v. Harp, 49 Ark. 161, 4 S. W. 751; Ex parte Griffiths, 118 Ind. 85, 86, 10 Am. St. Rep. 109, 20 N. E. 513; State v. Smith, 5 Mo. App. 430; De Votie v. McGerr, 14 Colo. 592, 28 Pac. 980; St. Croix L. Co. v. Pennington, 2 Dak. Ter. 473, 11 N. W. 497.

23 Cal. Code Civ. Proc., § 49, is substantially the same.

fornia and other states, upon the same and analogous questions, though, of course, no longer authoritative in California, on account of the subsequent constitutional provision.

§ 704. Succession of interest after appeal taken.

Rule 16 of the supreme court of California reads as follows: "Upon the death or disability of a party, pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution will be made, and the cause shall proceed as in other cases." Though the rule is mandatory in form, it is difficult to discover any effect a failure by both parties to comply with it would have upon further proceedings in the appellate court.[24] Of course, the court would not take judicial notice of the death of a party, and, after a decision was reached, probably neither party would be heard to urge the point as ground for a rehearing. In Black v. Shaw,[25] the case was argued at the July term, 1861, and, on the thirtieth day of December following, a judgment of affirmance was rendered. After the argument, and on the thirteenth day of December, the appellant died, and the fact was brought to the attention of the court afterward. The entry was corrected by vacating the

24 See Long v. Thompson, 34 Or. 359, 55 Pac. 978, holding that death of a party pending appeal does not abate the appeal, notwithstanding no application for a substitution was made within a year, as required by Code of Civil Procedure 38, the statute not applying where death occurs after appeal has been perfected.

25 20 Cal. 68. The same course was taken in McPike v. Heaton, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; Lucas v. Provines, 130 Cal. 270, 62 Pac. 509. When an administrator defendant is removed, pending an appeal, his successor appointed after the removal has the right to prosecute the appeal and defend the action: Kerns v. Dean, 77 Cal. 555, 19 Pac. 817. The substitution of the representative of a deceased person as a party to an action pending an appeal to the supreme court ought regularly to be followed by a like substitution, upon a proper showing, in the superior court in order properly to determine the responsibility for the costs upon appeal: Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977. Receiver of corporation should be substituted before appeal taken: Sioux Falls Nat. Bank v. Bank, 6 Dak. 113, 50 N. W. 829.

judgment as rendered on the thirtieth day of December, and entering it nunc pro tunc as of the twelfth day of December. The court, speaking as to the effect of the death, said: "The death of the appellant after argument of his case upon appeal does not constitute any ground for delaying a decision, or departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death."

But it seems that the rule is different if the death occur prior to argument. In that event, further proceedings can only be had upon leave given, after suggestion of the death is made.[26]

In Halloway v. Galliac[27] the respondent died after the submission of the cause, but his death was not brought to the attention of the court until after the remittitur went down. The remittitur was recalled, the decision set aside, and the decision and opinion rendered as of the date of the submission of the cause, entered accordingly, and another remittitur ordered forthwith. But in a later case it was held that a decision rendered by the supreme court, reversing the judgment of the trial court, after the death of the respondent, where no suggestion of his death, or motion to substitute his representatives had been made, was not void, but at the most erroneous, and, no fraud or imposition having been practiced upon the court, that upon the issuance of the remittitur, the judgment of reversal became a finality, beyond the power of the court to modify or amend.[28]

The rule requires the suggestion of the death in writing; and, if it be controverted, some evidence will be required. This may be furnished in the form of affidavits.[29] If the

26 Black v. Shaw, 20 Cal. 68. See, also, Savings etc. Soc. v. Gibb. 21 Cal. 609, 82 Am. Dec. 765.

27 49 Cal. 149.

28 Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023.

29 Sanchez v. Roach, 5 Cal. 248; Judson v. Lane, 35 Cal. 463, 468; McCreery v. Everding, 44 Cal. 286. In this case Justice Temple, delivering the opinion, said: "This appeal presents two questions: 1. Whether the court properly overruled defendant's demurrer to plaintiff's complaint; 2. Whether the court properly struck out a defense from the answer. Respondent confesses error in striking out the defense, and consents that the case be reversed on that ground. He says the point made by defendant on the demurrer is radical and

fact of the death be admitted, the admission and substitution may be entered in the minutes, without an affidavit. The entry in the minutes showing consent may be accepted as a waiver of the writing required by the rule, if indeed, the entry be not a compliance with the rule requiring the suggestion to be in writing. At any rate, that is the usual procedure where there is no dispute as to the fact.

The remedy by substitution does not extend to the case of an appeal taken in a wrong name. In the latter case, there can be no substitution in the appellate court.[30]

There is no necessity for a substitution in case of a mere transfer of interest between living persons; and where the assignee of the successful party, who had purchased his interest after judgment, moved to be substituted in his stead upon appeal, and the motion showed that the attorney for the respondent was the attorney, both for the original party and for the party moving for the substitution, it was held that there was no occasion for making the order, and the motion should be denied.[31] Nor do the requirements of the rule extend to the case of death of a transferee of a party.[32]

important, and will be argued when the case is again here, in such form as to require its determination. The question as to the correctness of this ruling is properly presented on this appeal from the judgment, and the consent of respondent to a reversal on some other ground, which does not dispose of the demurrer, cannot deprive appellant of his right to have it determined. The question there raised is whether defendant can be put to the labor and expense of a trial on the merits or not."

30 McCormick v. Snedegar, 3 S. Dak. 625, 54 N. W. 814.

31 Emerson v. McWhirter, 128 Cal. 268, 60 Pac. 774; Truffee v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Golden Terra Cotta Co. v. Smith, 2 Dak. 374, 11 N. W. 97. In the first case the court said: "The provision of section 385 of the Code of Civil Procedure, that in case of any transfer of interest in a cause of action, the action may be continued in the name of the original party, 'or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding,' has reference to a transfer of interest before the entry of judgment in the action. After the rights of the parties to the action have been finally determined and the judgment

32 Truffree v. Stearns Ranchos Co., 124 Cal. 306. 57 Pac. 69.

§ 705. Death of party before appeal taken—Before service of notice of motion for new trial.

But very different consequences result from the death of a party to the action prior to his being made a party to the appeal by service of the notice of appeal upon him, or of the notice of motion for new trial, in case of an appeal from an order on motion for new trial. In that case, the whole appellate proceeding as to such party is a nullity.[33]

§ 706. Succession in office.

Although rule 16 says nothing as to other transfers of interest than that which occurs upon the death of a party, it is evident, from the principles declared in Ex parte Linkum,[34] that, in case of a change in the incumbency of an office, the incumbent of which is officially a party to the action, there should be a substitution of the successor. It is evident that, upon proper construction of the provision, it does not apply to such transfers as affect the public, through the personality of a public officer. At any rate, such is the practical result of the above decision, although the distinction here noted was not pointed out.

thereon entered, others succeeding to their interests in the property affected by the action take the same subject to the judgment and with all its protection. The provision in the section is permissive, and the discretion of the court in making the order is to be exercised in view of all the circumstances attending the application. In the present case, as the corporation and McWhirter are represented by the same attorney—the motion for the substitution and the admission of its service being both signed by him—there would seem to be no occasion for making the order, as the rights of each, both for himself and as against the other, can be adequately protected."

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33 Judson v. Love, 35 Cal. 464; Schartzer v. Love, 40 Cal. 96. In Westheimer v. Goodkind, 24 Mont. 90, 107, 60 Pac. 813 (referred to in Hurley v. O'Neal, supra), the court said: "The special findings are inconsistent with the general verdict, and hence the former control. They do not support the judgment. The conclusion of law to be drawn from them is that the plaintiffs should recover. We shall not, however, order the entry of judgment, for the reason that we have

34 54 Cal. 201. See, also, Home for Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119; Lindsay v. Auditor, 3 Bush (Ky.), 231.

§ 707. Effect of bankruptcy proceedings pending appeal.

An appeal is not affected or stayed by the adjudication of the bankruptcy of a defendant who has appealed from a judgment against him. In Merritt v. Glidden,[35] after the appeal was submitted on briefs to be filed, the counsel for the defendants (appellants) filed in the supreme court an adjudication of their bankruptcy rendered by the register of the district court of the United States for the district of California. Said adjudication had been rendered after the appeal was taken. Their purpose for so doing was to have the proceedings in the supreme court stayed, until the question of the defendants' discharge should be determined. The court, in affirming judgment, after discussing the relevant provision of the bankruptcy act, said: "The judgment from which the appeal is taken is, in our opinion, final, in the sense of the statute. It was not, we think, the purpose of the statute to suspend the right of the plaintiff to maintain in the appellate court the correctness and validity of a judgment, from which the bankrupt might choose to take an appeal, until the determination of the question of the discharge of the bankrupt. To give the statute that construction, would place it in the power of the bank-

no means of knowing what, if any, exceptions were taken by the defendants in the court below. The only exceptions properly included in a transcript on appeal are those of the appellant: O'Rourke v. Schultz, 23 Mont. 293, 58 Pac. 712. In a given case (this is but an illustration) the trial court may have excluded admissible evidence tendered by the respondent, or erred in other ways to his prejudice; the findings of fact or the general verdict may, if allowed to stand, require a judgment for the appellant, although the facts might have been found otherwise had error not intervened. To order judgment for the appellant under such circumstances would work manifest injustice to the respondent." And in Edmonds v. Black, supra, the court said: "If we are to hold that the admission of the respondent as to the judgment had been made for any other purpose than that of the trial in which it was made, it might be our duty to direct a judgment in favor of the plaintiff, but we are not satisfied that such admission should have force against the respondent except for the purpose of deciding questions involved in the trial in which it was made; hence the order will be that the judgment be reversed and the cause be remanded for a new trial."

35 39 Cal. 559, 2 Am. Rep. 479.

rupt to delay, and thus defeat, remedies to which the plaintiff was entitled, and that, too, in cases where the appeal would be dismissed on motion of the plaintiff."

§ 708. Stipulations in supreme court.

The same laws govern the authority of attorneys, and their right to stipulate with reference to the whole subject of appeal, as with reference to the management of the action in the lower court. But, in order that a stipulation may bind a party, or be effective for any purpose, it is necessary that the proper party of record should sign it, And where a stipulation was filed in the supreme court by attorneys who, upon inspection of the record, were found not to have appeared for the parties in the lower court, the court refused to give any effect to it.[36]

§ 709. Suspending rules of court by stipulation.

Whether attorneys will be permitted to suspend or abrogate the requirements of the rules of the appellate court depends upon the purpose of the rule. As to mere methods of procedure, where the strict enforcement of the rule does not greatly subserve the convenience of the court, or facilitate the transaction of its general business, a stipulation dispensing with its requirements will be given effect; otherwise, the stipulation will be disregarded. In Reynolds v. Lawrence,[37] the court, after stating an additional reason for not giving effect to a stipulation, said: "Besides, the rule is for our convenience, and we do not acknowledge the unqualified right of parties to stipulate for the abrogation of the rules we have prescribed for the convenient dispatch of business. As well might they stipulate that the transcript should not be filed until after the

36 Estate of Arguello, 50 Cal. 308. In this case the court said: "A stipulation has been filed in this court, signed by the attorney of the administrator and by Scott as 'attorney for the heirs of Santiago Arguello, deceased,' consenting that the order of confirmation be affirmed here in part; but upon looking into the record, we observe that Jose A. Arguello did not appear in the court below by attorney, but in person, and that Luce appeared for the minor heirs interested in the proceeding. As he has not signed the stipulation, we cannot act upon it as a basis for the judgment to be entered in this court."

37 15 Cal. 360.

argument, or for an unlimited time for filing briefs, or for the making out the records contrary to our rules." All matters of mere form in perfecting the record on appeal, however, even the omission of some of the statutory requirements, not vital to the jurisdiction, may be waived by stipulation. In Weil v. Paul[38] the only statement on appeal was a stipulation, signed by the attorneys of both parties, agreeing that the judgment-roll, orders, and instructions given and refused by the court, the statement on motion for a new trial, and the stipulation thus signed, was "a true and correct statement on appeal to the supreme court," and might be used as such without further certificate or identification. None of these papers contained the grounds of appeal required by the Practice Act then in force. The respondent objected that, for this reason, the statement formed no part of the record, and should be entirely disregarded. But the court said: "We think, however, the agreement of the parties amounts to a waiver of this objection. It would be an injustice to the appellant if, after entering into an agreement of this kind, the respondent should be permitted to make such an objection in this court for the first time."

§ 710. Motions to strike out.

The motion to strike out is a method frequently resorted to to raise questions in the appellate court. In a previous section its use in the case of objectionable briefs has been shown. In the appellate courts of some states its use is more extensive than in others.

In California, a motion in the supreme court to strike out portions of a transcript, upon the ground that they are no part of the record, is not proper practice, and will be denied. If the matters sought to be stricken out form no part of the record, they will not be considered by the court upon the hearing of the case upon its merits.[39] But in Washington the motion is often employed to test the question of validity and

38 22 Cal. 492, 494. Ruling approved in Godchaux v. Mulford, 26 Cal. 320, 85 Am. Dec. 179.

39 Sutton v. Symonds, 97 Cal. 475, 32 Pac. 588.

[illegible] of portions of the record.[40] The same practice pre- [illegible] in Montana;[41] also in Nevada.[42] [illegible] will the motion be entertained [illegible] irregularities, or omissions in the proce- [illegible] not prejudicative of invalidity in the rec- [illegible]

[illegible] 3 Wash. 54, 36 Pac. 1050; Tatum v. Boyd, 11 [illegible] Baker v. Washington Iron Works Co., 11 [illegible] City of v. Tacoma Light & W. [illegible] See Anderson v. Northern Pac. Ry. [illegible] holding that a brief filed out of date [illegible] will be stricken from the files. To [illegible] Idaho), 69 Pac. 79.

[illegible] 63 Pac. 1043. Under Com- [illegible] 94, it is within the [illegible] an amendment of the writ [illegible] in error: Neher v. Armijo, [illegible]

[illegible] First Brigade, Nevada National [illegible]

[illegible] Lodge, 8 Wash. 529; United [illegible] 36 Pac. 476; [illegible] v. Kalispel Mer. Co., [illegible] Canal Water Co., 26 [illegible]

CHAPTER 42.

RELIEF GIVEN ON APPEAL.

§ 711. Generally as to power over judgments and orders appealed from.
§ 712. Power exercised in great variety of forms.
§ 713. Modification in various forms.
§ 714. Where judgment final in favor of appellant ordered.
§ 715. Same subject—Evidence not made the basis of order for judgment.
§ 716. Methods and forms of direction by appellate courts—Opinion and order construed together.
§ 717. Effect of reversal of judgment upon other proceedings in same case.
§ 718. Conflicting orders in same case—Construction of same.
§ 719. Effect of direction of appellate court upon power of lower court.
§ 720. Restitution on reversal.
§ 721. Frivolous appeals—Damages for.
§ 722. Damages upon dismissal of appeal.
§ 723. Costs on appeal.
§ 724. Effect of equal division of court.

§ 711. Generally as to power over judgments and orders appealed from.

In California, the court of highest appellate jurisdiction, the supreme court, derives its authority from the constitution exclusively. That instrument places no restriction upon the court with reference to the means and instrumentalities, methods or forms for exercising that jurisdiction. The legislature may indeed provide, and has provided, the proceedings necessary for the bringing of causes within the appellate jurisdiction, but the question of how the supreme court shall proceed in the disposition of these causes, after the vesting of the

propriety of portions of the record.[40] The same practice prevails to a considerable extent in Montana;[41] also in Nevada.[42] But in neither of these states will the motion be entertained when based upon mere irregularities, or omissions in the procedure of the lower court, not productive of invalidity in the record on appeal.[43]

40 See Case v. Ham, 9 Wash. 54, 36 Pac. 1050; Tatum v. Boyd, 11 Wash. 712, 39 Pac. 639; Baker v. Washington Iron Works Co., 11 Wash. 335, 39 Pac. 642; Tacoma (City of) v. Tacoma Light & W. Co., 16 Wash. 288, 47 Pac. 738. See Anderson v. Northern Pac. Ry. Co., 19 Wash. 340, 53 Pac. 345, holding that a brief filed out of date and by an attorney not of record will be stricken from the files. To same effect, Ellis v. Bingham County (Idaho), 60 Pac. 79.

41 See Carr v. Closser, 25 Mont. 149, 63 Pac. 1043. Under Compiled Laws of 1897, section 2685, subsection 94, it is within the power of the supreme court to permit an amendment of the writ of error by striking out parties defendant in error: Neher v. Armijo, 9 N. Mex. 325, 54 Pac. 236.

42 See Reinhart v. Company D, First Brigade, Nevada National Guard, 23 Nev. 369, 47 Pac. 979.

43 See Phillips v. Port Townsend Lodge, 8 Wash. 529; United States Sav. etc. Co. v. Jones, 9 Wash. 434, 37 Pac. 666, 36 Pac. 476; Doyle v. Gove, 13 Mont. 471, 34 Pac. 846; Griggs v. Kalispel Mer. Co., 14 Mont. 300, 36 Pac. 81; Kranick v. Helena Consol. Water Co., 26 Mont. 379, 68 Pac. 408, 71 Pac. 672.

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jurisdiction is, as has been shown, left, to a great extent, to the court itself.[1]

The code[2] provides that "the supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." The corresponding provision in the Practice Act of 1851 was substantially the same.

It may well be doubted whether the court would not have always possessed and exercised the same powers without, as with, this provision. Courts vested with paramount authority over the decisions of other courts must necessarily exercise very extensive powers with respect thereto. It would be idle to thus confer appellate jurisdiction without limit and then deny to the tribunal upon which it is conferred the power to either enter and enforce, or to direct the entry and enforcement of, such judgment or order as it found the parties properly before it entitled to. The power to review and revise includes the power to reverse as well as to affirm, and to direct a new judgment or order in lieu of the one found upon appeal to be erroneous. And the same may be said with respect to new trials ordered by the higher court, upon appeal from the judgment. If it find that the rights of a party can only be secured, or can be most certainly secured, by a new trial, and having the unquestionable power to decree the party to be entitled to a new trial, it may go further and direct that he shall have a new trial in the court of original jurisdiction, the only court having jurisdiction and instrumentalities for conducting a retrial. The authority of the appellate court would, without such incidental powers, be unreal. If it could not so mold its judgments and orders as to compel trial courts to conform to its decisions, the benefit of an appeal would be purely imaginary, or entirely dependent upon the willingness of the trial court to acquiesce.

Appellate courts seldom attempt to prescribe the phraseology or form of the judgment resulting from the appellate proceeding. But occasionally an exception is found to this proposi-

1 See ante, § 465.

2 Cal. Code Civ. Proc., § 53.

tion. Thus, in Luethe v. Luethe,[3] the court said: "As a rule, we do not undertake to direct the entry of judgments in matters of form, but in this case, to the end that there may be a speedy end of this litigation, we will direct the entry of a modified decree by the county court."

The duty imposed upon the lower court by the order of the appellate court may be merely clerical, or it may call for the exercise of discretion, and some power of construction. If the order is for a judgment in specific terms, imposing no task of construction, the judgment directed may be entered by the clerk.[4]

§ 712. Power exercised in great variety of forms.

So uniformly have been the ample powers specified in the next preceding section exercised without hesitation, doubt or question, by all high appellatte tribunals, that few judicial expositions of the underlying principle are to be found. All that can be done in the way of further information and enlightenment on the subject is to state what was done in individual cases, and the controlling features of such cases.

The court may reverse and direct a new trial as to some of the parties, and affirm as to others.[5]

The court may not only distinguish in its decision between parties, but may discriminate with reference to issues. It may remand a cause for retrial as to some of the issues, and leave it in force as to the other issues.[6] When that is done,

3 12 Colo. 421, 21 Pac. 467.

4 McMillan v. Richards, 12 Cal. 467.

5 Stockton etc. C. R. R. Co. v. Galgiani, 49 Cal. 139. This case illustrates the proposition as to the nondependence of the supreme court upon the code provision prescribing the rule of decision on appeal. The words of the Practice Act, "as to any or all of the parties" was omitted from the code provision. See, also, Union Trust Co. of New York v. Atchison etc. R. Co., 8 N. Mex. 159, 42 Pac. 89; Polleck v. Polleck (S. Dak.), 68 N. W, 176.

6 Argenti v. San Francisco (City of), 30 Cal. 459, 464. See, also, Soule v. Dawes, 14 Cal. 247; Soule v. Ritter, 20 Cal. 522; Marzion v. Pioche, 10 Cal. 545. Where joint tort-feasors are sued jointly and a judgment recovered against both, and a new trial is granted

it operates a setting aside of the judgment, pending the retrial, and is virtually a reversal. Otherwise, there would be two judgments in the same case, one on the issues not to be retried, and another upon those to be retried, and they might be inconsistent. Moreover, the judgment which is entered upon the retrial of a part of the issues may be wholly different from that which is set aside.

The judgment may be reversed as to some, and modified as to others. Thus, where plaintiff in ejectment was found not entitled to any relief as to one defendant, and was in possession as to some of the property for the possession of which his action was brought, the judgment was reversed, as against the one, and so modified as to the other defendants as to exclude from its operation the lot in plaintiff's possession.[7] So the judgment may be affirmed as to one or more and modified as to others. Thus, where three actions of claim and delivery for personal property against as many separate defendants were tried together as one case, and plaintiff recovered an alternative money judgment for the same amount against each, and the record showed that only a half interest in the property sued for, as against one of the defendants, belonged to the plaintiff, the judgment was affirmed as to two, and modified by reduction to one-half as against the other.[8]

The record may show that, while the plaintiff may be able to make good his allegations against one or more of the defendants, there is no possibility of a recovery against others. In that case, a retrial may be ordered as to part, and a dismissal ordered as to part.[9] On like principle, the court may set aside a judgment of dismissal, in order to give plaintiff an opportunity to amend, and direct the court below to issue

to one of them only, resulting in a judgment against him for a smaller amount than that of the first judgment, still standing against the other defendant, the last judgment cannot be reversed upon the ground that there can be but one verdict or judgment in the joint action, there being no pretense that any part of the first judgment had been paid or satisfied: Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

7 Conroy v. Duane, 45 Cal. 597, 609.

8 Kimball v. Lohmas, 31 Cal. 154, 160.

9 Gratton v. Wiggins, 23 Cal. 16, 40.

a temporary injunction restraining defendants from interfering with plaintiff's rights.[10]

It is the same thing where the court has found on most of the material issues, but has neglected to find, or has found contrary to the evidence, upon one or more. And, in such case, the appellate court will sometimes, instead of ordering a new trial upon all the issues, vacate the judgment and direct a retrial upon the omitted issue, leaving the findings upon the others to stand, a final judgment to be entered upon all after such retrial.[11]

It is observable that in all such cases the judgment below is vacated, a new one to be entered. In one case, it seems to have been held unnecessary that there be a retrial as to an omitted issue. The direction of the appellate court was in the alternative. In Watson v. Cornell[12] the order read, "Judgment reversed and cause remanded, with directions to find upon all the material issues in the cause, or in case of inability to so find, to try the action anew." It is thought, however, that, after the lower court has thus lost jurisdiction, it could not make new findings without a new trial, at least as to the omitted findings, and that not even the supreme court could confer the power to do so.[13] But the retaking of testimony already taken may be dispensed with, and more evidence directed to be taken, if the lower court be so advised, findings to be then made upon all material issues.[14] But where a respondent (plaintiff), against whom a judgment on reversal had been entered, has omitted to file in the court below an affidavit showing due service upon the adverse party until after the decision had been rendered on appeal, he will not be entitled to an affirmance on showing due service in his petition for rehearing. The case will be remanded for the entry of judg-

10 Boise City (City of) v. Artesian Hot etc. Water Co., 4 Idaho, 351, 392, 39 Pac. 562, 39 Pac. 566.

11 Kinsey v. Green, 51 Cal. 379, 381. To same effect; Le Cleer v. Oullahan, 52 Cal. 252; Billings v. Everett, 52 Cal. 661; Phipps v. Harlan, 53 Cal. 87.

12 52 Cal. 91.

13 See ante, §§ 400, 401, 607, 608.

14 Swift v. Canavan, 52 Cal. 417, 419.

ment in the lower court upon a retrial, with permission to the respondent to file his summons with proof of service indorsed upon or attached thereto.[15]

Where the court from which an appeal is taken had no jurisdiction of the action, the appellate court only has jurisdiction to reverse the judgment, with a direction to dismiss the action or to dismiss the appeal.[16]

§ 713. Modification in various forms.

Where there is palpable error in the record, the judgment may be modified by striking out the erroneous portion, if separable from the balance, allowing it, as thus modified, to stand. Thus, in Kern Valley Bank v. Chester,[17] as to an item for interest and taxes, the judgment was erroneous, and the court remanded the cause with a direction that it be stricken out, and, as thus modified, affirmed it. So, where a complaint did not allege any special damages, and yet special damages were given, that item was directed to be stricken out.[18] So, where the jury found for the plaintiff in a sum less than that for which the judgment was entered, the judgment was modified so as to correspond with the verdict.[19] But, where a statute provided that, where a judgment or decree was reversed or modified by the appellate court, it "may direct complete restitution of all property and rights lost thereby," it was held that

15 Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

16 State v. Superior Court, 9 Wash. 369, 37 Pac. 489.

17 55 Cal. 49, 52. To same effect, Kelly v. McKibben 54 Cal. 192, 194; Barnes v. Jones, 51 Cal. 303, 307; Freeborn v. Norcross, 49 Cal. 313; Behlow v. Shorb, 91 Cal. 141, 27 Pac. 546; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120. In the last case the lower court was directed to make the correction.

18 Patten v. Froment, 47 Cal. 165. Damages stricken out in Anderson v. Ryder, 46 Cal. 135; Welch v. Sullivan, 8 Cal. 511; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099, where the principle was acted upon.

19 Hayward v. Rogers, 62 Cal. 349; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395. See, also, Stickney v. Hanrahan (Idaho), 63 Pac. 189; Garner v. Van Patten, 20 Utah, 342, 58 Pac. 684.

the appellate court should merely direct restitution, and remand the cause to the court below for enforcement of the order, if the right to restitution depends entirely on matters outside the record.[20]

The plaintiff (respondent) may, on appeal, consent to remit an excess, and the judgment may be affirmed conditionally upon his filing the remittitur.[21] A clear case for thus reducing the judgment is where it exceeds the amount demanded in the complaint, provided the item constituting the excess can be identified by the record, as where interest on the judgment was computed as part of it and entered accordingly.[22] So, where the interest has been computed at an erroneous rate, the judgment may be modified by directing a computation at the correct rate.[23]

In short, there is no limit to the changes and modifications which may be made, if within appellate jurisdiction, and warranted by the record.[24]

20 See McFadden v. Swinerton, 36 Or. 336, 62 Pac. 12, 59 Pac. 816.

21 Butler v. Collins, 12 Cal. 457, 467.

22 Gautier v. English, 29 Cal. 166, 169; Dent v. Holbrook, 54 Cal. 145, interest stricken from judgment not being a case in which interest was recoverable.

23 Hill v. Eldred, 49 Cal. 399, 402; White v. Lyons, 42 Cal. 279, 285; Cassin v. Marshall, 18 Cal. 689, 693.

24 See Racouillat v. Sausevain, 32 Cal. 376, 398; where a clause was inserted marking the decree against an executor payable "in due course of administration"; Drake v. Foster, 52 Cal. 225. To same effect; Kelly v. Bandini, 50 Cal. 530, to same effect; Barron v. Kennedy, 17 Cal. 577, where the insertion of the usual provision in a decree of foreclosure in case of a deficiency after sale of the premises was directed; Moore v. Massini, 43 Cal. 392, where exclusion from the operation of a decree of certain land was directed; Howe v. Independence Co., 29 Cal. 75, where the imposition of costs was directed to be provided for; Roland v. Kreyenhagen, 18 Cal. 457, to same effect; Heinlin v. Martin, 53 Cal. 321, 345, where part of rents and profits allowed directed to be omitted; Hibernia etc. Soc. v. Herbert, 53 Cal. 375, 378, where part of demand for which judgment given barred by statute of limitations, and part not; and judgment modified accordingly; Berry v. Ivanice, 53 Cal. 653, modification with respect to ownership and possession; Wallace v. Miller, 52 Cal. 655, amount of fractional interest in property reduced; Gates v. Salmon, 46 Cal. 353, 379, giving specific directions for further

And the supreme court may, if there be proper data in the record itself, make the modification and correction, and if there be none, or it be insufficient, it may direct the trial court to institute the proper investigation and make it.[25] This ample power of the appellate court is not defeated or diminished by the fact that, in making the order or rendering the judgment appealed from, the lower court exceeded its jurisdiction.[26]

A reversal and not a modification must be ordered, however, unless the record be sufficiently full and complete to allow the modification to be made intelligently and with exact regard to the rights of all the parties.[27]

proceedings in partition suit; People etc. v. Sierra Buttes Q. M. Co., 39 Cal. 511, 516, court directed to make computation and enter judgment accordingly; People v. Pacheco, 27 Cal. 176, 228, where the order was "that the district court modify its judgment by striking out all that portion of the said judgment subsequent to the denial of the injunction, and of the relief sought in the complaint, and that the judgment as thus modified stand as the judgment of the court"; Union W. Co. v. Murphy's F. F. Co., 22 Cal. 621, 632, where form of judgment prescribed; White v. White, 86 Cal. 216, 24 Pac. 1031, court directed to modify by allowing additional counsel fees; Ryan v. Fitzgerald, 87 Cal. 345, 25 Pac. 546, modification so as to require return of additional property in action of claim and delivery; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811, modification to make judgment payable by executrix in due course of administration; Robinson v. Crescent C. M. & T. Co., 93 Cal. 316, 28 Pac. 950, modification limiting scope of restraining order; Reid v. Reid, 112 Cal. 274, 44 Pac. 564, modification dealing separately with portion of decree dealing with community property in divorce case.

25 See Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275, where there was an apparent error in charging the whole amount of taxes to the mortgagor, when only one-third thereof should have been charged to him, and it was held not to warrant an entire reversal of the judgment, and the trial court was ordered to make the appropriate corrections, upon proofs to be taken upon that point, also directing that if, upon taking such proofs it should appear to the court that the proper deduction had been made in the account already taken, no change should be made.

26 Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

27 See McMenomy v. Band, 87 Cal. 134, 26 Pac. 795; Hampton v. Board Commrs. etc., 4 Idaho, 646, 43 Pac. 324, holding that error in record on appeal from money judgment necessitates reversal

With respect to conditional modifications, the practice varies somewhat, the court in some instances supervising performance of the condition, and in other instances remitting the whole matter to the lower court, for instance, where the respondent is required to remit a portion of the damages awarded, as a condition to affirmance or modification, in lieu of reversal and new trial. Thus, in Atherton v. Fowler,[28] the order was as follows: "It is ordered that the judgment be reversed and the cause remanded, with directions to the court below to proceed to try the case anew, unless, within twenty days after the filing of the remittitur in the court below, the defendant shall file with the clerk of that court a written consent that the judgment be modified by striking out the damages therein awarded, and inserting in lieu thereof the sum of eight thousand nine hundred and eighty-nine dollars; and upon such consent being filed, it is ordered that the judgment be modified accordingly, and also that it be made payable in due course of

where appeal from entire judgment. See, also, Brauer v. Portland (City of), 35 Or. 471, 60 Pac. 378, 58 Pac. 861, 59 Pac. 117; Leake v. Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

28 46 Cal. 323, 327. To same effect, Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766; Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334, 43 Pac. 713, 42 Pac. 860; Cochran v. Baker, 34 Or. 555, 52 Pac. 520, 56 Pac. 644. See, also, Hodapp v. Sharp, 40 Cal. 69, 73, same form plaintiff being required to remit damages, and thereupon judgment affirmed as to part of land in controversy, as to balance of land reversal and new trial ordered; Mahoney v. Middleton, 41 Cal. 41, 55, reversal and remand for new trial as to one defendant, reversal and remand for new trial as to the other appellants, unless respondent release within twenty days all claim for damages, rents and profits (in this case release appears to have been filed in supreme court, and thereupon modification made); Kline v. Central Pacific R. R. Co., 39 Cal. 587, 592, to same effect; Kinsey v. Wallace, 36 Cal. 462, 481, where stipulation remitting damages directed to be filed in supreme court, also in Carpentier v. Gardiner, 29 Cal. 160, 166. See, also, Tarbell v. Central Pac. R. R. Co., 34 Cal. 616, 623; Pinkerton v. Woodward, 33 Cal. 557, 608, 91 Pac. 657; Lally v. Wise, 28 Cal. 540, 544; Price v. Reeves, 38 Cal. 457, 461, where respondents were required to file within fifteen days a stipulation consenting to a modification striking out a gold coin clause in the judgment; otherwise the judgment would be reversed and a new trial ordered.

administration." And when a judgment is reversed, unless the respondent remit a certain amount, with directions that, upon the performance of the condition thereof, it is to stand affirmed, and the condition is afterward complied with, the judgment thereupon becomes and continues to be affirmed.[29]

The court will, under some circumstances, direct a dismissal of the action, unless certain proof be made by the plaintiff at the trial. Thus, in McCracken v. San Francisco,[30] the conditional reversal was, unless proof be made at the trial of a reconveyance and surrender of property to the defendant, the action should be dismissed.

The respondent sometimes anticipates the view of the court and offers to remit part of the judgment in the appellate court, in order to avoid the consequences of a reversal.[31] It is rarely, however, that this can be done, without the consent of the appellant. And where the appellant contended that the trial court improperly overruled his demurrer to the complaint, and improperly struck out a defense from his answer, it was held that the consent of the respondent to a reversal of the judgment, upon the ground that the court erred in striking out the defense, could not deprive the appellant of his right to have the correctness of the ruling on the demurrer determined.[32]

§ 714. Where judgment final in favor of appellant ordered.

An order for the entry of final judgment on the record in favor of the appellant seldom follows, as a necessary result of a successful appeal, it being entirely discretionary with the appellate court. The discretionary power to so direct is recognized in the code provision previously quoted, but existed, and was exercised, prior to any provision on the subject. But the power cannot be exercised unless all the material facts are es-

29 Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929.

30 16 Cal. 591, 641. For another case of conditional reversal where a decree affected personal property: See Crowther v. Rowlandson, 27 Cal. 388.

31 See De Casla v. Massachusetts etc. Min. Co., 17 Cal. 613, 618; O'Grady v. Barnhisel, 33 Cal. 287, 297; Muller v. Boggs, 25 Cal. 175, 187; Fox v. Hall etc. Min. Co., 122 Cal. 219, 54 Pac. 270.

32 Brown v. Jenks, 98 Cal. 10, 32 Pac. 701.

tablished in the lower court, either by the special verdict of a jury, or the findings of a judge or referee, or by an agreed statement of acts, or admissions in the pleadings. The reports abound in illustrations of its exercise where these conditions were found. A small percentage of such cases are cited in the note.[33] To warrant this course, the record must present

[33] **Upon admissions in the pleadings:** Hills v. Sherwood, 33 Cal. 474; Alexander v. Greenwood, 24 Cal. 506, where dismissal of the action directed; Mason v. Cronise, 20 Cal. 212, direction to enter final judgment for defendant upon demurrer; People v. Hartley, 21 Cal. 585, 82 Am. Dec. 758, and note, same; Kiorski v. Matthews, 25 Cal. 592, direction for judgment for amount tendered by defendant, defendant to recover costs; O'Connor v. Frasher, 56 Cal. 499, reversal and direction for judgment for appellant on pleading; Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958.

Upon findings of the court: Thomas v. Moody, 57 Cal. 275; Hendy v. Dinkerhoff, 57 Cal. 7; Hearst v. Egglestone, 55 Cal. 365; Fletcher v. Mower, 55 Cal. 122; Olney v. Sawyer, 54 Cal. 379; Vigourex v. Murphy, 54 Cal. 346; Watson v. Rogers, 53 Cal. 401; Mastic v. Cave, 52 Cal. 67; Haggin v. Clark, 51 Cal. 112; Meyer v. Metzler, 51 Cal. 142; Burton v. Robinson, 51 Cal. 186; Curtis v. Sprague, 51 Cal. 239; Nathan v. King, 51 Cal. 521; Mull v. Van Trees, 50 Cal. 547; Marks v. Sayword, 50 Cal. 57; Camarillo v. Fenton, 49 Cal. 202; Weaver v. Wood, 49 Cal. 297; Cunningham v. San Joaquin Co., 49 Cal. 323; Serrano v. Rawson, 47 Cal. 52; Hancock v. Pico, 47 Cal. 161; Englebrecht v. Levy, 47 Cal. 627; Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; Potter v. Ames, 43 Cal. 80; Sichel v. Corillo, 42 Cal. 493; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266 and note; Low v. Hutchings, 41 Cal. 634; People v. Kohl, 40 Cal. 127; Ayres v. Bensley, 32 Cal. 631; Dougherty v. Miller, 36 Cal. 89; Oakland Paving Co. v. Bagge, 79 Cal. 439, 21 Pac. 855; Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858; Overacre v. Blake, 82 Cal. 77, 22 Pac. 979; Gaffney v. Megrath, 11 Wash. 456, 39 Pac. 973.

Upon report of referee: Gray v. Collins, 42 Cal. 158; McLaughlin v. Piatri, 27 Cal. 452; Donahue v. Cromartie, 21 Cal. 80; Fulton v. Hanlon, 20 Cal. 450.

Upon verdicts: Leese v. Clark, 20 Cal. 388; McDermott v. Burke, 16 Cal. 580; Kimpton v. Jubilee Placer Min. Co., 16 Mont. 379, 41 Pac. 137, 42 Pac. 102; Wood Livestock Co. v. Woodmansee (Idaho), 61 Pac. 1029.

Upon agreed statement: Donner v. Palmer, 51 Cal. 629; Mason v. Johnson, 51 Cal. 612; Frisbie v. Moore, 51 Cal. 516; Treadwell v. Holloway, 46 Cal. 548; Wells-Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Jones v. Petaluma (City of), 38 Cal. 397; Ions v. Harbison, 112

the whole case fully, in all its material phases; and it must be reasonably certain that the respondent could not finally prevail upon a remand for further proceedings. In Schroeder v. Schwenitz-Lloyd, etc.,[34] the court quoted with approval from a New York case, as follows: "Extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in case where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced, cannot prevail in the suit." Though the principle thus announced has been subjected to some criticism, it has been usually recognized and given controlling effect in subsequent cases.[35] It seems well founded upon justice and reason.

A Wyoming statute authorizes questions to be certified for decision to the supreme court. In such cases, the higher court will not determine the judgment to be rendered in the case in which the questions are involved.[36]

Cal. 260, 44 Pac. 572; Eureka (City of) v. McKay, 123 Cal. 666, 56 Pac. 439; Kelly v. Leachman, 4 Idaho, 402, 39 Pac. 1113, modification upon stipulation; Forrester v. Boston & M. Consol. etc. Co., 24 Mont. 148, 60 Pac. 1088, 61 Pac. 309.

34 60 Cal. 467, 472, 44 Am. Rep. 61, quotation from Griffin v. Marquardt, 17 N. Y. 28. See, also, Jungerman v. Bovie, 19 Cal. 355, 364, where the court said: "The averment of damages does not seem to be denied, and no proof of the amount was made. The case is remanded that this matter may be determined. We think it better not to direct judgment, as the defendant may have been taken by surprise, but remand the case to be tried de novo upon this matter of damages, where the pleadings may be amended so as to present the issue fairly, if amendments be desired." See, also, People v. Hagar, 19 Cal. 462; Oakland Paving Co. v. Bogge, 79 Cal. 439, 21 Pac. 855; Merrill v. First Nat. Bank, 94 Cal. 59, 29 Pac. 242; Minnehaha Nat. Bank v. Torrey, 10 S. Dak. 548, 74 N. W. 890. Running of high rate of interest held not sufficient reason to induce appellate court to direct final judgment, rather than a new trial; San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 Pac. 686. But where a judgment consisting of two separable amounts was appealed from, and it was determined that plaintiff was not entitled to recover one of the amounts, the judgment was modified without reversal: Elfring v. New Birdsall Co. (S. Dak), 92 N. W. 29.

35 See Cox v. McLaughlin, 63 Cal. 196.

36 Rasmussen v. Baker, 7 Wyo. 117, 50 Pac. 819.

If it appear that the prior trial was not in all respects fair, or that the respondent might, without his fault, have fallen into an error or misapprehension, a new trial will be ordered. Thus, where it appeared that the respondent might have been induced to rest his defense upon one ground by the intimations of the court in a previous case, which had since been overruled, the case was reversed and remanded for further proceedings.[37] A different rule applies where the appellate court finds no error in the record. In that case, it has no election but to affirm the judgment or order, as where it appeared that the complaint of the plaintiff, appellant did not state a cause of action.[38]

In view of the liberality shown by the courts in permitting amendments, it is obvious that a reversal and order for judgment upon admissions in pleadings might, in many cases, deprive a party of the right to further litigate a meritorious cause of action or defense. Hence, appellate courts are more reluctant to direct the entry of judgment upon the pleadings than upon findings covering all the issues. Accordingly, in McMillan v. Dana,[39] the court said: "The answer does not seem to present a defense to the action; but we think we cannot order judgment here, for there seems to have been no trial be-

37 Thomasson v. Wood, 42 Cal. 416. See, also, Cooper v. Shepardson, 51 Cal. 298; Edmonds v. Black, 13 Wash. 490, 43 Pac. 330; Libbey v. Packwood, 11 Wash. 176, 39 Pac. 444, 647; Hurley v. O'Neill, 26 Mont. 269, 67 Pac. 626.

38 Fry v. Hubner, 35 Or. 184, 57 Pac. 420. Where an appeal is dismissed upon the motion of appellant, the respondent is entitled to an affirmance of the judgment of the lower court, when the time limited by law within which another appeal may be taken from the same judgment has already expired: Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104. The supreme court will not cut a case in two, and direct a final judgment as to one part, and an affirmance or retrial as to the other part, but will order a retrial of the whole case, where it cannot, without the consent of the parties dispose of the cause without creating such complications: Seattle etc. Ry. Co. v. Claussen-Sweeney B. Co., 5 Wash. 462, 466, 32 Pac. 102.

39 18 Cal. 339, 348. See, also, Fowle v. House, 30 Or. 305, 47 Pac. 787. Where amendment to complaint only required in order to insert true name in lieu of fictitious name, new trial not ordered: Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

low, and we cannot know what course the defendants would have taken, by amendments or otherwise, by way of defense to plaintiff's action." Nevertheless, where a pleading upon which a party relies is fatally defective, and it is not seen how it can be made sufficient by amendment, judgment will be ordered.[40]

§ 715. Same subject—Evidence not made the basis of order for judgment.

Since it is a cardinal principle of appellate jurisdiction that only questions of law will be decided, however much the examination of facts stated in the record may be incidentally necessary to involve legal questions, a final judgment for the appellant will not be directed where the evidence must be resorted to in order to determine what the judgment of the lower court should be.[41] The court must frequently decide as to the sufficiency of the evidence to support a particular decision of the lower court, but having done that, and finding it sufficient, will uphold the decision; and, finding it insufficient, will order a new trial, even though that be the only question brought up.[42]

40 See cases cited in a preceding note; also, Stockton S. & S. G. v. Hildreth, 53 Cal. 721. For a case where a reversal and remand for new trial at the instance of the respondent offering to confess errors was denied. See Sun Ins. Co. v. White, 118 Cal. 468, 50 Pac. 546.

41 See Merrill v. Hurlburt, 63 Cal. 494, where the court adhered to this rule although the difference between the value shown by the evidence and that found by the court was only fifteen dollars; Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532; Kohler v. Fairhaven etc. Ry. Co., 8 Wash. 452, 36 Pac. 253, 681.

42 Ede v. Knight, 93 Cal. 159, 28 Pac. 860; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Kellogg v. King, 114 Cal. 378; Butte & B. etc. Min. Co. v. Mont. etc. Co. (Mont.), 55 Pac. 112; Bateman v. Raymond, 15 Mont. 439, 39 Pac. 520; Bright v. Ecker; 9 S. Dak. 192; 68 N. W. 326. See, also, Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. 996; Vermont L. & T. Co. v. Vaughn, 25 Wash. 219, 65 Pac. 188; Nephi Irr. Co. v. Vickers, 20 Utah, 310, 58 Pac. 836; Robson v. Hamilton, 41 Or. 239, 69 Pac. 651. It appears elsewhere that in Oregon, Utah, Washington, and several other states the supreme court investigates issues of fact in equity cases: See ante, § 680, and under Revised Statutes, paragraph 949, providing that the supreme court shall, on reversing judgment, render such judgment as should have been rendered, unless it is necessary to ascertain some matter of fact or assess damage, where all the evidence is before the court it will,

So, where the findings as they stand do not support the judgment for the appellant, and the appellant is entitled to a reversal of the judgment, it cannot be modified in the appellate court, so as to give the appellant the relief to which he is entitled, as the appellate court cannot make findings for the court below, but can only reverse the judgment.[43] And the rule is adhered to, even though the omitted finding relates to ever so slight a matter of fact, if it be material.[44] And where a verdict is general, and one of the causes of action pleaded cannot be maintained, and it cannot be determined what part of the verdict is referable to other valid causes of action, a new trial must be granted.[45] Nor will the appellate court usurp the functions of the trial court in matters of discretion, in order to direct final judgment. Thus, where a judgment was reversed because based on a finding of fact outside the issues, it was held that the question as to whether the parties should be allowed to amend must, in the first instance, be determined by the trial court, in the exercise of judicial discretion.[46]

The rule on this subject has been long established. In Lick v. Diaz,[47] the court said: "The counsel have urged us, in view

on reversing render judgment for the party shown by the evidence to be entitled thereto: Egan v. Estrada (Ariz.), 56 Pac. 721. In North Dakota, where the statement of a case tried without a jury fails to embrace all the evidence offered at the trial, and the conclusions of law and the judgment are justified by the findings of fact, the judgment will be affirmed, but without prejudice to further proceedings by the parties which may be instituted: Littel v. Phinney, 10 N. Dak. 351, 87 N. W. 593.

43 Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Ponting v. Isaman (Idaho), 65 Pac. 434; Davis v. Devanney (Idaho), 65 Pac. 500. Same rule where jury disregarded instructions in damage case: Wright v. Southern Pac. Co., 14 Utah, 383, 46 Pac. 374. But it was held that a finding which was contrary to facts stated in the pleadings, and a decree following such findings, could be modified on appeal: Stickney v. Hanrahan (Idaho), 63 Pac. 189. And where there is uncertainty as to the terms of a judgment on findings, the case will be remanded, with an instruction to modify the judgment to conform to such findings: Gose v. Blalock, 21 Wash. 75, 57 Pac. 342.

44 See Niles v. Edwards, 90 Cal. 10, 27 Pac. 159.

45 Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622.

46 Male v. Schaut, 41 Or. 425, 69 Pac. 137.

47 37 Cal. 437, 446.

of the protracted and expensive litigation which has already occurred about this lot, to render a final judgment in the case, if practicable. But the result must depend on controverted facts which it is not our province to decide, and it is, therefore, impracticable for us to render a final judgment."

This rule holds good, notwithstanding the clear weight of the evidence, and though it all be on one side, provided the issuable facts be controverted by the pleadings. And in Ellis v. Jeans,[48] where the counsel for the respondent offered to release one hundred and eighty acres of land from the operation of the judgment, and thus secure a modification and final determination, the court said: "If the particular location of the one hundred and eighty acres appeared either in the pleadings or by the findings we might order the modification upon the basis of the record, but there is nothing in either showing the location, and we are not at liberty to examine the evidence for the purpose of determining the location as a matter of fact. To do so would be to exercise original rather than appellate jurisdiction."

But the foregoing rule is not inimical to the frequent practice of the court of striking out a finding, or a part of a verdict, distinctly severable from the rest, where not supported by the

48 26 Cal. 272, 277. See, also, Central Pac. R. R. Co. v. Yolland, 49 Cal. 438, 446; Poorman v. Mills, 43 Cal. 323, the court saying: "But as the court decided for the defendants, it will be implied that one or more of the material facts were found against the plaintiff. It is not the province of this court, as we have often held": Polhemus v. Carpenter, 42 Cal. 375, 387; Rush v. Casey, 39 Cal. 339, 343, the court saying: "If the findings are erroneous, it is not our province, on an appeal from the judgment, to look into the evidence with a view to reform the findings, and then to enter a judgment in accordance with what we think the findings ought to have been. In doing so, this court would undertake to weigh the evidence and usurp the functions of a trial jury, whose especial province it is to pass upon the facts. We have repeatedly decided, in cases of that character that where the findings do not support the judgment, instead of undertaking to reform the findings by an examination of the evidence, we will reverse the judgment and remand the case for a new trial"; Hidden v. Jordon, 32 Cal. 401; Carpentier v. Gardiner, 29 Cal. 165; Bagley v. Eaton, 10 Cal. 149; Kimball v. Semple, 25 Cal. 455.

evidence, and leaving the judgment to stand so far as it is supported by the rest. This has been done where verdicts were returned for a certain sum in gold coin, the evidence not showing the plaintiff to be entitled to gold coin. In such cases the supreme court struck the gold coin clause from the verdict and judgment, and directed judgment for the sum awarded.[49] So where damages were awarded, by a verdict in two separate items, one of which was permissible under the pleadings, the other not, the court ordered one of the items to be stricken out, and directed judgment for the other.[50]

Another practice of the court, apparently inimical, or exceptional to the rule against examining the evidence, is where the whole record, embracing the pleadings, findings and evidence are examined to ascertain whether, if a new trial were directed, the plaintiff could by any possibility recover. In such cases, if it be found upon such inspection that upon no conceivable showing could a judgment for the plaintiff be supported, judgment of dismissal will be directed.[51]

§ 716. Methods and forms of direction by appellate courts—Opinion and order construed together.

There is not usually found any rule governing, or any particular uniformity in, the mode pursued by, appellate courts in rendering their decisions, or entering their judgments. For the most part the order follows the language of the opinion of the justice who delivers it. Consequently, the form varies, even where the same thing is intended and directed. As a further consequence, applications are frequently made for the correction of appellate judgments in these particulars, which are al-

49 Williston v. Perkins, 51 Cal. 554; Lorenz v. Jacobs, 53 Cal. 23. Same principle in Burnett v. Steans, 33 Cal. 468.

50 Moody v. McDonald, 4 Cal. 297. See, also, Carpentier v. Gardiner, 29 Cal. 164, where the plaintiff was allowed to remit the damages and allowed to recover possession of the land.

51 See Begley v. Nunan, 53 Cal. 403; Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110. Action for a wager: Wills v. Austin, 53 Cal. 152, 180; People v. Seale, 52 Cal. 71; Keema v. Doherly, 51 Cal. 3, 8; San Benito Co. v. Whiteside, 51 Cal. 416; People v. Cane, 48 Cal. 427; Gett v. McManus, 47 Cal. 56; Eldorado County v. Davison, 30 Cal. 521; Crowell v. Sonoma County, 25 Cal. 316.

ways granted, where the court can see from the opinion and record that substantial justice will be promoted thereby.[52]

Although an order for a new trial is usually added to an order of reversal, nothing is thereby added to the legal effect of such order. A reversal of a judgment has no other effect than to set aside and vacate it, leaving the parties standing as they stood before the trial. The effect of such an order was first considered by the California supreme court in Stearns v. Aguirre.[53] There the defendants had, on a former appeal, obtained a reversal, the order being simply, "judgment reversed." Upon a retrial, the judgment was for the defendants, and on the second appeal the defendants urged an affirmance upon the ground that the former reversal was an end of the litigation. The court, in overruling the point, said: "We are now called on, for the first time, to determine whether a simple judgment of reversal is a bar to further proceedings in the same suit, and as the point has never before been adjudicated by this court, and we have no rule of court or of law which would control our judgment in the premises, we think it would be more just to follow the rule of the common law on this subject, by which the parties in this suit have in all probability been governed. At common law, the appellate court either affirms or reverses the judgment, upon the record before it. The opinion which is rendered is advisory to the inferior court,

52 For correction of remittitur, see post, § 734.

53 7 Cal. 443, 449. See, also, Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809, holding that court below cannot after reversal, and on the strength of the former trial, order findings to be prepared and a judgment in conformity therewith entered in favor of a party; Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065, where it was explained that when the appellate court reverses a judgment and order denying a motion for a new trial, without remanding the case for further proceedings, the parties are placed in the lower court in the same position as if the case had never been tried, with the exception that the opinion of the appellate court must be followed in the new trial; Faulkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386; Estate of Rose, 66 Cal. 241, 5 Pac. 220, holding that the reversal by the appellate court of a decree settling the account of an administrator sets aside such settlement, and thereafter any person interested in the estate may appear in the lower court, and file exceptions to the account: Collier v. Ervin, 2 Mont. 556.

and after the reversal of an erroneous judgment, the parties in the court below have the same rights that they originally had." Nor does the addition of the words "and remanded," or "and cause remanded," alter the legal effect of a reversal. In Ryan v. Tomlinson [54] the court said: "The questions raised on the present appeal were not before us on the former one, and it does not admit of debate that, on the reversal of a judgment and second trial, the parties may introduce new proofs in support of the complaint or defense, as the case may be. There is no force in the suggestion that the decision of this court on the former appeal ended the case, so that it could not be retried. The order was, 'judgment reversed and cause remanded.' Unless it was apparent from the opinion of the court that the adjudication was intended to be a final disposition of the cause, the effect of the reversal was only to set aside the judgment, that a new trial might be held." And in case of such an order, as well as where a new trial is expressly directed in unlimited terms, the retrial is upon all the issues made by the pleadings, and not merely as to such issues as may have been discussed in the opinion.[55]

As previously shown, an order of the appellate court for a new trial may limit the retrial to particular issues; but a general order necessitates a retrial upon all the issues. And this is so, regardless of anything in the opinion not clearly inconsistent with the terms of the order. This was explained in Irwin v. Towne,[56] as follows: "In reversing the order denying the motion for a new trial, an opinion was filed in, which a con-

54 39 Cal. 639, 645.

55 Hidden v. Jordan, 28 Cal. 303.

56 43 Cal. 23. To same effect, Mattock v. Goughnour, 13 Mont. 300, 34 Pac. 36; Mattingly v. Lewisohm, 13 Mont. 518, 35 Pac. 111. But it was held in Coombs v. Salt Lake etc. Ry. Co., 11 Utah, 137, 39 Pac. 503, in an action against a railway company for damages from the construction of its road, and to enjoin such operations till the damages were paid, the court awarding plaintiff damages, but denying an injunction, plaintiff appealing from that part of the judgment refusing an injunction, and neither party taking other exceptions, and the appellate court deciding the refusal of an injunction error, and reversing the judgment, that defendant was not entitled to a new trial on the question of injunction.

struction was given to the descriptive calls in the deed under which the plaintiff claimed, but the opinion intimated nothing as to what particular proceedings were to be had on the return of the cause to the court below. It concluded as follows: 'Order denying a new trial reversed and cause remanded for further proceedings in accordance with this opinion.' Had the court below sustained the motion of the plaintiff for a new trial, no question could have arisen as to the proceedings to follow in the cause. Had no appeal been taken from such an order a new trial must have been the result, unless the plaintiff had dismissed the action. The order of this court reversing the order denying the motion and remanding the cause for further proceedings in accordance with the opinion filed, places the case, in point of the mere procedure to be followed, in the same situation as though the court below had itself directed a new trial, for, as we have said, there is nothing to be found in the opinion filed which would indicate that the proceedings to be had should be different from the proceedings in any other case in which an application for a new trial had been allowed." And for the same reason, the affirmance of an order granting a new trial leaves nothing in the court below upon which an appeal from the judgment can operate.[57] The retrial will, however, affect only those parties who were before the appellate court.[58] But this rule has a practical as well as a theoretical side. The order of the appellate court sometimes necessarily opens the way to new proceedings by nonappealing parties, and where judgment against two defendants is reversed on an appeal taken by one of them and thereupon on his motion is vacated and set aside by the lower court, he cannot afterward object to the right of the defendant who did not appeal to participate at the retrial.[59]

57 Etchas v. Orena, 121 Cal. 270, 53 Pac. 798.

58 Little v. Superior Court, 74 Cal. 219, 15 Pac. 731. See, also, Nichols v. Dunphy, 58 Cal. 605; Littell v. Miller, 8 Wash. 566, 36 Pac. 492. In this case the plaintiff recovered judgment against two defendants for damages alleged to have been caused by their negligent act; and upon appeal of one of the defendants the judgment as to his was reversed. Held, that the plaintiff was entitled to execution against the other defendant.

59 Pfister v. Wade, 69 Cal. 133, 10 Pac. 39. But this case is exceptional, and is affected by the doctrine of estoppel. Its authoritative value is limited.

And there is an entirely different effect produced between a reversal of a judgment, or of an order denying a new trial, and that produced by the reversal of an order granting a new trial. The latter leaves the judgment standing in full force.[60] It is, nevertheless, to be kept in mind that, although a general order for a new trial is upon all the issues, yet the retrial must be in accordance with the legal principles laid down upon the first appeal, if the same case is made by the evidence, the views so expressed constituting the law of the case. And, as was also previously explained, new and different evidence may be introduced, calling for the application of different principles, thus rendering the doctrine of "the law of the case" inapplicable; or the pleadings may be amended with the same result.[61]

§ 717. Effect of reversal of judgment upon other proceedings in same case.

Each judgment is the combined result of several, and sometimes many, incidental proceedings in the same case, all of which are reversed, or at least nullified by a reversal of the judgment.[62]

There was in the Practice Act of 1851, a provision that in case of a reversal of a judgment, or an order, the court "may set aside or confirm or modify any or all of the proceedings subsequent to or dependent upon such judgment or order." But the code contains no such provision, the same having been deemed superfluous, no doubt. The effect of this principle is seen where the court, upon rendering a judgment for the plaintiff in ejectment, perpetually stayed the commission of waste by the defendant. It was held that a reversal of the judgment upon the ground that the latter had the better title, had the effect to set aside the order staying waste, though it was not expressly referred to.[63] In this case, the court said: "The question is not worthy, we think, of the laborious con-

60 Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205. But where the reversal is due to the fact that the order was prematurely made, the result is to leave the motion still pending in the lower court, undisposed of: Thomas v. Sullivan, 11 Nev. 280.

61 See post, § 719.

62 Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100.

63 McGanahan v. Maxwell, 28 Cal. 75, 88.

sideration bestowed upon it by counsel. The cause of action to restrain the commission of waste consists of the allegations that the plaintiff has title to the premises, that the defendants are in possession without title and threaten to commit the alleged waste, and are unable to respond in damages for the injury. The plaintiff's right to the equitable relief is dependent upon his title to the premises. The court, having found that the title to the premises was in the plaintiff, and that the defendants were wrongfully in possession; and having found, as we may presume, the other facts which were necessary to entitle the plaintiff to the equitable relief prayed for, the court was thereupon authorized to grant the injunction. The basis of the equitable relief was the title of the plaintiff to the lands in controversy, and if the court had not adjudged that the title to the premises was in the plaintiff, the injunction could not have been ordered; and it inevitably follows, that if the cause is appealed and the decision of the court below respecting the title is reversed, the injunction, like all other proceedings dependent upon that decision, must fall with it."

Where an appeal from an order denying a new trial results in a reversal, the judgment is thereby reversed.[64] On the other hand, if a reversal result from an appeal from an order granting an injunction, the judgment stands unaffected, unless it has been set aside and vacated upon a separate appeal from the judgment in the same case.[65] Nor is a title vested under regular proceedings to enforce a judgment pending an appeal taken from the judgment devested by a reversal of the judgment.[66]

The nullifying operation of the principal rule is confined to those orders and proceedings upon which the order or judgment appealed from rests; and where a judgment of nonsuit is

64 Kower v. Gluck, 33 Cal. 407; Westall v. Altschul, 126 Cal. 164, 58 Pac. 458; San Jose S. D. B. of S. v. Bank of Madera, 121 Cal. 543; 54 Pac. 85; Estate of Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192; Holland v. McDade, 125 Cal. 353, 58 Pac. 9.

65 See ante, § 561.

66 Withers v. Jacks, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824. See, also, Batchelder v. Brickell, 75 Cal. 373, 17 Pac. 441. Same principle enforced in Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786.

ordered set aside by the appellate court, and the cause is remanded, with directions to the court below to proceed in accordance with the opinion, and neither the opinion nor the mandate requires a trial de novo to be granted, the effect is to place the case in the same position in the court below as it was in at the time when the progress of the trial was interrupted by the motion for the nonsuit, and the court may resume the trial, and proceed therewith in the same manner as it would have done if no judgment of nonsuit had been entered.[67] But an appeal does not generally lie from the order for nonsuit. If the appeal be taken from the judgment entered upon a nonsuit, different principles apply, the ruling of the court being treated merely as an error occurring at the trial.[68]

§ 718. Conflicting orders in same case—Construction of same. It may, and often does, happen in practice that separate appeals taken by the same party, or even by different parties, in the same case, results differently—that is to say, there may be a reversal upon the first appeal and an affirmance upon another, or vice versa. Thus, the same party may appeal from the judgment, and subsequently appeal from an order denying a motion for a new trial, and, though an affirmance may result upon the former, he may secure a reversal and a new trial upon the latter. The affirmance of the judgment in such case does not operate to oust jurisdiction of the appellate court to hear and determine the second appeal, and to make the proper order therein. In such case, if a reversal be secured on the appeal from the order, it operates a reversal of the judgment, notwithstanding its prior affirmance.[69]

67 Warren v. Robinson, 21 Utah, 429, 61 Pac. 28. An order substituting the personal representative of a deceased defendant is not necessarily vacated by a reversal of the judgment on appeal: White v. Ladd, 34 Or. 422, 56 Pac. 515.

68 See ante, §§ 332, 354.

69 See Donner v. Palmer, 45 Cal. 180, 183; Thompson v. Alford, 128 Cal. 227, 60 Pac. 686; ante, § 417. A prior appeal from an order appointing the receiver does not enlarge the rights of the plaintiff, nor affect the operation of a subsequent appeal from the judgment, but is independent of the latter appeal: Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61.

The California code[70] provides a more speedy and summary method for attacking a judgment unsupported by the findings than an appeal therefrom. Such remedy is merely cumulative, and was not designated to supersede the remedy by appeal. Upon such appeal, the judgment may be reversed, and the court below directed to enter the judgment required by the findings.[71]

§ 719. Effect of direction of appellate court upon power of lower court.

Where the order of the appellate court is for the entry of a particular judgment, the lower court may not retry the case,[72] and any judgment there entered different from that directed to be entered is void.[73] The lower court has no discretion in the matter.[74] In Mulford v. Estudillo,[75] the court, referring to the action of the lower court in a case where the appellate court had directed a particular judgment to be entered, and its direction had been ignored, by both parties as well as the lower court, said: "If it can be maintained that the judgment was merely erroneous, the same would be true of a third or any further judgment, and thus there might be an indefinite number of judgments between the same parties for the same cause of action, all of which might be enforced unless reversed by the appellate court." As to what use can be made of the opinion in explanation of the order depends greatly upon the character of the opinion. If its reasoning is of general scope, involving for the most part mere abstract principles of law, it will furnish

70 Cal. Code Civ. Proc., §§ 663, 663½.

71 Patch v. Miller, 125 Cal. 240, 57 Pac. 986. See, also, ante, § 8.

72 See Soules v. McLean, 15 Wash. 22, 45 Pac. 653; Smith v. Wilkins, 38 Or. 583, 64 Pac. 760; Taylor v. Taylor, 5 N. Dak. 58, 63 N. W. 893.

73 See In re Mahon, 71 Cal. 586, 12 Pac. 868, holding that where lower court disregards direction, it may amend the judgment so as to make it conform. See, also, State v. Superior Court etc., 17 Wash. 380, 49 Pac. 507.

74 Montana Lumber etc. Co. v. Obelisk Min. etc. Co., 16 Mont. 117, 40 Pac. 145.

75 32 Cal. 131. See, also, as to compliance with directions of appellate court generally, Meyer v. Kohn, 33 Cal. 486; Argenti v. San Francisco, 30 Cal. 461.

but little aid. On the other hand, if it discusses the facts of the case, and points out specifically the errors for which the action of the lower court is reversed or modified, it may make that plain about which there might otherwise be serious doubt. But where the order itself contains no specific directions, except a bare reference to the opinion, the latter alone can be resorted to for information as to the intentions of the appellate court. An instance of this kind is found in Keller v. Lewis,[76] where, upon the former appeal, at the end of the opinion, was this direction: "Judgment and order reversed, and cause remanded with directions to the court below to render a decree in accordance with the views herein expressed." The court said: "The opinion of this court, and its direction that the court below render judgment in accordance with the views therein expressed, became and is the law of this case; and the court below had but to follow the direction thus given."

It is not always easy to determine whether the appellate court intends that a modified judgment shall be entered, or that there shall be a retrial. Sometimes the intention must be inferred from incidental expressions.[77] But the lower court is not only bound by express directions, but any which result as a necessary inference. Upon this principle where an order refusing to change the place of trial is reversed upon appeal a judgment rendered against the appellant, before the reversal of the order, will be reversed on an appeal therefrom, without inquiring as to the commission of errors on the trial, although the appellant may have appeared at the trial and contested the right of the respondent to recover.[78] And where a retrial is

76 56 Cal. 466, 469.

77 See Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017, where the lower court had upon a former appeal directed "to modify the judgment in favor of the executrix of the deceased executor, by deducting the interest therefrom, and, further, if it should be rendered necessary upon the new trial"; and it was held proper for the court not to enter a new judgment, but, if no further modification was found necessary, to deduct from the judgment as entered the amount thereof, which was made up of such interest; Chafoin v. Rich, 92 Cal. 471, 28 Pac. 488.

78 Howell v. Thompson, 70 Cal. 635, 11 Pac. 789.

had, it should be conducted subject to the directions given in the opinion.[79]

§ 720. Restitution on reversal.

The California code contains the following provision on the subject of restitution, upon reversal by the supreme court. "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases, the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale."[80] This provision is held to be not mandatory, and not to give the appellant an absolute right to a restitution of possession in the cases to which it is applicable, but the whole subject is discretionary with the appellate court.[81] A provision on the subject was contained in the Practice Act of 1851. It did not authorize any

79 Chandler v. People's Sav. Bank, 65 Cal. 498, 4 Pac. 502.

80 Cal. Code Civ. Proc., § 957. See Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643; Gutierrez v. Superior Court, 106 Cal. 171, 39 Pac. 530; Warner v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017. Where the court below has made an improper order granting an execution while there is a proper bond on file to stay execution, the appellate court will grant a writ of supersedeas to stay the execution of the judgment: Brown v. Rouse, 115 Cal. 619, 47 Pac. 601. Suit may be maintained in equity to enforce restitution, and if restitution in kind is impracticable, restitution in money may be decreed: Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624. Under Hill's Annotated Laws of Oregon, section 545, providing that where a judgment of decree is reversed or modified by the appellate court, it "may direct complete restitution of all property and rights lost thereby," the appellate court will merely direct restitution, and remand the cause to the court below for enforcement of the order, if the right to restitution rests entirely on matters outside the record: McFadden v. Swinerton, 36 Or. 336, 59 Pac. 816, 62 Pac. 12, modified on rehearing.

81 Spring Valley W. W. v. Drinkhouse, 95 Cal. 220, 30 Pac. 218. See, also, Yndart v. Den, 125 Cal. 85, 57 Pac. 761.

interference with the rights of third parties who had become purchasers under the judgment.[82]

Under the code provision, the supreme court has power to direct an order compelling restitution of costs collected in the enforcement of a judgment.[83]

The rights of purchasers of land, sold under the judgment, will be protected; but where the plaintiff had himself become the purchaser, under a judgment which was reversed, and had subsequently assigned the sheriff's certificate of purchase, and the judgment to a third party, it was held that such third party stood in the same relation to the defendant as that occupied by the defendant, and that he could be ordered to make restitution. He had not, prior to the reversal and order of restitution, paid the purchase price. It was also held that, under the circumstances, he could not claim to be an innocent purchaser without notice.[84] But in this case, the lower court was directed to make and enforce restitution, the power not being exclusive in the appellate court.

The above code section is construed according to its literal terms; and a judgment debtor, in case of a mere modification of the judgment to the extent of relieving him from only a part of the judgment, has not "lost" any property or rights "by the erroneous judgment" so as to entitle him to the restitution of the property, unless more of his property has been taken than the amount for which the judgment has been affirmed.[85] And the provision is held to apply only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents or of particular personal property in the hands of defendant, and the like.[86] The true

82 See Farmer v. Rogers, 10 Cal. 335.

83 Stockman v. Riverside L. and I. Co., 64 Cal. 57, 60, 28 Pac. 116.

84 Reynolds v. Harris, 14 Cal. 668, 681, 682, 76 Am. Dec. 459.

85 Hewitt v. Dean, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93. Another good illustration of the principle of this case is found in Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 Pac. 218. See, also, Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176; Yndart v. Den, 125 Cal. 85, 57 Pac. 761.

86 Hewitt v. Dean, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93; Farmer v. Rogers, 10 Cal. 335.

rule under the provision was thus stated in Ashton v. Heydenfeldt:[87] "It does not follow because a party has a right, under a certain state of facts, to a judgment and the fruits of it, that he must necessarily be entitled to those fruits forever afterward. A judgment, so long as it continues unreversed and unsuspended, may be enforced; but when it is reversed, it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back. . . . . Here the equity of Reynolds arose after the reversal, to be restored to whatever he lost by the judgment."

It has been shown in a preceding section,[88] that titles regularly acquired under proceedings taken to enforce the judgment, are not disturbed by a reversal. The rule, however, has no application where the person seeking to be restored has been wrongfully dispossessed by agency of the court.[89]

§ 721. Frivolous appeals—Damages for.

In the absence of a better definition of a frivolous appeal, that in the code must be accepted. The provision in California is that "Where it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just."[90]

87 124 Cal. 14, 17, 5 Pac. 624, quoted and adopted from Rann v. Reynolds, 18 Cal. 276, 290. See, also, Owen v. Pomona Land etc. Co., 124 Cal. 331, 57 Pac. 71.

88 Chapter 31.

89 See Quan Wo Chung v. Laumeister, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac. 320.

90 Cal. Code Civ. Proc., § 957. A similar provision was in the prior Practice Act Laws, 1851, pp. 105, 106. Appeal held dilatory and frivolous in Muller v. Rowell, 110 Cal. 318, 42 Pac. 804; Hearst v. Hart, 128 Cal. 327, 60 Pac. 846; Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Matter of Sharp, 92 Cal. 577, 28 Pac. 783; Daugherty v. Ward, 89 Cal. 81, 26 Pac. 638; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. 840; Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382; Himebaugh v. Cranch, 3 S. Dak. 409, 53 N. W. 862. Instances where only error assigned was that lower court did not properly consider conflicting evidence: Long v. Sauffley, 89 Cal. 437, 26 Pac. 902, where only ground of appeal was insertion of costs in judgment before taxation; Janes v. Bullard, 107 Cal. 130, 40 Pac. 108; Roundtree v. Lime Co. (The I. X. L.), 106 Cal. 62, 39 Pac.

Since delay is an inseparable consequence of every appeal, something more must appear than that delay resulted. Surely, no one should be fined by the imposition of damages who exercises the statutory right of appeal, in the absence of any showing of bad faith. The mere fact that the appeal is groundless or, as is commonly expressed, "without merit," cannot be accepted as an infallible test. Every unsuccessful appeal is of that character.

The appellate court usually determines by the record before it, whether the appeal has been taken with a bona fide expectation of success, or merely for delay. The record may disclose such a waiver of the means for effective prosecution of the appeal, or it may be so defective, as to make it obvious that no one of the slightest legal knowledge would hope for a reversal thereon. Thus, in Spinetti v. Brignardello,[91] the only transcript consisted of the notice of appeal and judgment-roll, and the judgment was entered, as appeared by a recital therein, "on reading and filing the stipulation of the respective parties." The court added ten per cent damages and affirmed the judgment, without deeming it necessary to say what was obvious, namely, that the appeal was frivolous. Where the difference between the amount claimed in the complaint and that admitted by the answer to be due was only twenty dollars, and the evidence as to the amount due was conflicting, the court merely remarked that the appeal was frivolous, and affirmed the judgment, with fifty per cent damages.[92]

The conduct of the appellant in the appellate court, for instance, failing to file points and authorities, or to appear at the hearing and offer argument, may warrant the conclusion that the appeal was taken merely for delay.[93]

The court is not, however, confined to that portion of the record which relates to the manner of prosecuting the appeal, but will observe the conduct of the appellant in the lower court,

16; mere clerical error, easily corrected by application to lower court; Lemon v. Rucker, 80 Cal. 609, 22 Pac. 471, holding good faith of counsel no excuse.

91 53 Cal. 283.

92 Kincaid v. Johnson, 47 Cal. 618.

93 See Mix v. Boothe, 54 Cal. 589.

as well as the general nature of the case, in reaching a conclusion as to the good faith or frivolity of the appeal. In Hancock v. Pico,[94] the appellant (defendant below), being sued upon a money demand, placed his case in the hands of attorneys, and left the state, without verifying an answer, and as a consequence, no answer was filed, or defense made. After judgment, he sought to set aside the judgment without any showing of surprise, mistake or inadvertence, and brought his appeal from the order denying his application. The order was affirmed, with twenty per cent damages. So, where the defendants set up counterclaims to the action below, which did not appear to exist in their favor, at the time of the commencement of the action, and appealed from the judgment for plaintiff upon sustaining their demurrer thereto, the court declared the appeal to be without merit, and affirmed the judgment with ten per cent damages.[95]

§ 722. Damages upon dismissal of appeal.

The court will usually treat an appeal as frivolous where the action is upon a money demand, and the proof clear and conclusive, especially if the record shows no bona fide attempt to defend at the trial.[96]

The judgment may be affirmed without damages in favor of some of the respondents, and with damages as to others.[97]

Affidavits will also be considered, on the question whether the appeal is in good faith or frivolous, where damages are claimed upon that ground on motion to dismiss the appeal for failure to take some essential step in its prosecution. The court will not, upon motion to dismiss, examine the record for the purpose of determining whether the appeal was frivolous or

94 40 Cal. 153.

95 Gannon v. Dougherty, 41 Cal. 661. See, also, Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218; Heston v. Martin, 11 Cal. 42; Tuolumne C. W. Co. v. Columbia etc. W. Co. 10 Cal. 194; Wilber v. Sanderson, 43 Cal. 496; Perkins v. Patrick, 45 Cal. 393; Nickerson v. California Stage Co., 10 Cal. 520; Lezinsky v. White, 45 Cal. 278; People v. Culverwell, 44 Cal. 620; Nilhoe v. Biven, 28 Cal. 410.

96 See Perkins v. Patrick, 45 Cal. 393; Adler v. Winkle, 53 Cal. 187.

97 See Southern Pac. R. R. Co. v. Reed, 41 Cal. 257, 262.

not. But, where an uncontradicted affidavit shows that the appeal was taken for delay, damages will be allowed on the dismissal of the appeal.[98]

As to how far the court would look into conflicting evidence on such motion seems not to have been decided. In McFadden v. Deitz,[99] where the respondent served his notice to dismiss the appeal, and for damages, he made and served upon the appellant an affidavit, which set forth statements and declarations of the appellant, to the effect that the appeal was taken for delay, and the statements in the affidavit were in no way denied. And it was so in the other cases cited therein by the court.

In such cases, inasmuch as the court cannot inspect the record as a basis for estimating the damages, a gross sum is awarded. But the better practice is to set out in the affidavit the facts which will constitute a fair basis for computing the damages. Without affidavits, it is held in California, damages cannot be imposed on dismissal of the appeal for failure to file the transcript;[100] otherwise, in Idaho[101] and Washington.[102]

§ 723. Costs on appeal.

There has always been, in California, a statutory provision governing costs on appeal. The present code provision, in addition to the general provisions allowing costs to the successful party, contains the following: "In the following cases, the

98 McFadden v. Deitz, 115 Cal. 697, 47 Pac. 777; Duncan v. Grady, 99 Cal. 552, 34 Pac. 112; Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781. The fact that an appeal is frivolous is no ground for its dismissal: Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120.

99 115 Cal. 697, 47 Pac. 777.

100 Vaughn v. Werley, 62 Cal. 181. Damages inflicted for delay in procuring and filing transcript in Phoenix Assur. Co. v. McDermot, 7 N. Dak. 172, 73 N. W. 91.

101 Day v. Gridley (Idaho), 56 Pac. 77.

102 Griffith v. Maxwell, 22 Wash. 634, 61 Pac. 708. See, also, Agassiz v. Kelleher, 9 Wash. 656, 38 Pac. 221, holding that on dismissal of an appeal at the instance of appellant, the supreme court will retain jurisdiction of the cause to permit respondent, after the time for appeal has expired, to move for an affirmance of a judgment and damages, and for judgment on the appeal bond.

costs of appeal are in the discretion of the court: 1. When a new trial is ordered; 2. When a judgment is modified."[103] In addition to this, a rule of court—23—is in force, reading as follows: "When causes are placed upon the calendar, parties shall be primarily liable for costs as follows: 1. If by the appellant, he shall first be liable; 2. If by the respondent, or by consent, then both parties. In civil cases, the clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to costs of appeal, the clerk will enter upon the record, and insert in the remittitur a judgment that the appellant recover the costs of appeal."[104] The court rule on the subject in force since 1878, as above quoted, removes all uncertainty on the subject of costs in cases of reversal or modification, no matter what further directions are added, unless there be some direction as to costs. This rule was totally disregarded, however, in San Francisco Savings Union v. Long.[105] No reason was ever assigned, although the subject of the costs was litigated, and subsequently came before the court. All that can be said by the record is that the corporation (respondent) succeeded in depriving the successful appellants of their costs.[106]

103 Cal. Code Civ. Proc., § 1027. This is the same as section 500 of the Practice Act of 1851. For statement of rule as to cost in South Dakota, see Dalbkemeyer v. Scholtes, 3 S. Dak. 183, 52 N. W. 871.

104 Rule 44, Supreme Court.

105 123 Cal. 107, 55 Pac. 801. The decision is in direct conflict with the later case of Baker v. Southern Pac. Ry. Co., 130 Cal. 113, 62 Pac. 302. In the latter case the court held as follows in favor of the corporation (appellant): Where a judgment of the superior court is reversed on appeal, without the insertion in the order of any direction as to costs, it is the duty of the clerk of the supreme court under rule 23 of that court, to enter upon the record a judgment that appellant recover his costs of appeal, and to insert such direction in the remittitur. If the clerk enters the judgment correctly, but omits to insert such direction in the remittitur, the appellant is entitled to have the remittitur recalled, and a proper one issued, and it is not laches to delay the application therefor to the next term of the supreme court in the district in which the appeal was heard.

106 See Long v. Superior Court, 127 Cal. 686, 60 Pac. 464.

Costs here referred to are only costs on appeal. The costs in the lower court are governed by principles not here considered.[107] The court costs proper are the clerk's fees, fixed by statute;[108] and the cost of printing the transcript by rule of court.[109] The rules also provide how the respondent may obviate the incurring of any expense in the authentication of the transcript, and in case of his refusal to do, for the taxing as costs of the expense of procuring the clerk's certificate thereto.[110]

Nothing is said eo nomine, either in the section above quoted, or in the court rule, with reference to costs in cases of affirmance or reversal with directions to enter final judgment in favor of the appellant. It was probably supposed that the general provisions found in other sections would apply, and that the successful party would recover costs as a matter of course. In the cases where the costs are subject to the discretion of the court, there is no fixed rule of determination. In some such cases, costs are allowed to the appellant; in others, to the respondent. Sometimes no mention was made on the subject of costs. In a few cases, costs were made to abide the final result in the lower court.

The court will sometimes, where it considers the transcript unnecessarily voluminous, allow cost for only part of it.[111] and, in one such case, refused to allow any costs for it whatever.[112] But it is to be borne in mind that the court often makes the omission in the record the basis of its decision, and that "surplusage doth not vitiate." Considerable study may be

107 See Gray v. Gray, 11 Cal. 341.

108 See Cal. Pol. Code, § 752.

109 Rule 13, vol. 130, Cal. Rep.

110 See McDougal v. Downey, 45 Cal. 165; Sichel v. Carrillo, 42 Cal. 493; Mendocino County v. Morris, 32 Cal. 145; Budd v. Holden, 28 Cal. 124; Harper v. Minor, 27 Cal. 107.

111 Rule 11. Where a respondent alleged in an additional abstract that no bill of exceptions or statement of the case was ever settled, and proceeded to set out a transcript of the stenographer's notes, having no part of the record, the cost of printing such transcript was held not allowable: Neeley v. Roberts, 12 S. Dak. 225, 80 N. W. 1078. See, also, Kirby v. Tel. Co., 8 S. Dak. 54, 65 N. W. 482.

112 Bullard v. His Creditors, 56 Cal. 606.

profitably devoted to finding and traveling on the safer middle ground.

Statutes exist allowing attorneys' fees to be taxed as costs in certain cases. Thus a claimant of mechanic's lien is entitled, upon affirmance upon appeal of a judgment in his favor, to a reasonable sum for attorney's fees in the appellate court.[113]

The method of collecting the costs of appeal is usually prescribed by statute.[114]

§ 724. Effect of equal division of court.

What is popularly known as a "tie-vote," or "deadlock," sometimes occurs in appellate courts. In cases of absolute nonaction, the judgment or order of the lower court stands unaffected. While an equal division of the appellate justices is not technically an affirmance,[115] yet it has the same results, and there are expressions to the effect that such a condition constitutes an affirmance.[116] But, sometimes, in case of an equal division, those who favor a reversal concur in an affirmance merely in order to terminate the litigation, and such an affirmance does not involve the decision of any matters of law.[117]

113 Clark v. Taylor, 91 Cal. 552, 27 Pac. 860. See, also, Smith v. Solomon, 84 Cal. 537, 24 Pac. 286, holding that when the appeal is for failure to file transcript in time is from a judgment foreclosing a mechanic's lien the court below will be directed to allow, as additional costs in the case, a reasonable attorney's fee for the services of the attorney for respondent in the supreme court.

114 See Cal. Code Civ. Proc., § 1034.

115 Luco v. De Toro, 88 Cal. 26, 25 Pac. 983.

116 Frankel v. Diedeshiemer, 93 Cal. 73, 28 Pac. 794.

117 Luco v. De Toro, 88 Cal. 26, 25 Pac. 983.

CHAPTER 43.

REHEARING, AMENDMENT, AND CORRECTION.

§ 725. Belongs to inherent powers of court—Constitutional and statutory provisions.
§ 726. Rehearing and hearing in bank distinguished.
§ 727. Proceedings for and upon rehearing and hearing in bank.
§ 728. Rehearings after decision in original proceeding.
§ 729. Motions to amend and to correct mistakes in the record.
§ 730. Modification without rehearing—Extensive meaning of latter term.
§ 731. Disqualification of justices.
§ 732. Reargument on account of equal division of court.

§ 725. Belongs to inherent powers of court—Constitutional and statutory provisions.

The power to rehear causes coming before it on appeal, after a decision, has always been exercised by the supreme court of California, as an incident to appellate jurisdiction. Rehearings were granted, in proper cases, prior to any constitutional or statutory provisions on the subject. No limitation is recognized with respect to the causes and grounds upon which a rehearing will be granted; and it was held that a rehearing should be granted, though the result must be the same as announced in the original opinion, when the concurrence of one of two judges constituting the court, delivering the former opinion, was limited to the result, and the opinion failed to consider a material point raised, and announced rules of law which, in judgment of the court as constituted when the motion for rehearing is considered, require modification to prevent misapplication of the same upon a new trial.[1] But the error or defect to be corrected must be within the power of the appellate court; and a rehearing will not be granted to give

1 Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. 1097.

an opportunity to open a decree below which has been affirmed, in order that newly discovered evidence may be heard. The remedy is by original suit to vacate the decree.[2]

It is only the final orders or judgments of which rehearings will be granted. A petition for rehearing will not lie in case of preliminary, or interlocutory, orders made by the court.[3] Nor will a rehearing be granted upon a purely technical ground.[4] It is not granted except where there is a strong probability that substantial error has occurred, or that some controlling matter has been overlooked in rendering the decision.[5]

At present, there are, in California, a constitutional provision, a statutory provision, and rules of court on the subject. The constitutional and code provisions are the same, and read as follows: "The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but when a cause has been allotted to one of the departments and a judgment pronounced therein, the order must be made within thirty days after such judgment, and concurred in by two associate justices; and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final; provided that no judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice in writing with the concurrence of two associate justices."[6] The rules of the court on the subject relate principally to methods of procedure, and limitations upon the time for, and effect of, filing the petition. They cover some of the same ground covered by the statute and constitutional provision.

2 Nessley v. Ladd, 30 Or. 564, 48 Pac. 420.

3 Prout v. Mounce (Idaho), 57 Pac. 307.

4 Mattoon v. Railway Co., 6 S. Dak. 301, 60 N. W. 69. See, also, Jacobs v. Sheron, 4 Idaho, 341, 39 Pac. 193.

5 Grigsby v. County, 7 S. Dak. 421, 64 N. W. 179; Vallier v. Brakke, 7 S. Dak. 551, 64 N. W. 1119.

6 Cal. Const. 1879, art. 6, sec. 2; Cal. Code Civ. Proc., § 44.

Another provision on the subject is found in the code to the effect that "the judgment of the court in bank shall be final, unless, within thirty days after such judgment, an order be made in writing, signed by five justices, granting a rehearing."[7] This recognizes the power which already existed to grant rehearings. As to the part of the provision providing an exclusive method of granting rehearings, that is unconstitutional.[8]

The constitution of 1879 merely sanctions the exercise of a power which was uniformly exercised prior to its adoption; consequently, neither the new constitutional provision nor the statute has added anything to the right, or power, of the court herein. These are inherent in the court, as a court of appellate jurisdiction, with which it was vested from the time of its creation, the constitutional provisions establishing the court and defining its jurisdiction, in so far, at least, as affects this question, having always been the same.

It will be observed that the constitution makes no provision for a rehearing after a decision has been rendered by the court in bank. In several cases, rehearings upon such decisions were granted without question. But when a case had been heard and decided by the supreme court in department, and afterward by the court in bank, it was held that the right to a petition for a rehearing in bank would not be recognized.[9] In Bullard v. Coe,[10] the appeal was originally submitted to the court in bank, and the judgment of the lower court was affirmed. Subsequently, a rehearing was granted by a minute order. Counsel for respondent, in their printed argument on the rehearing, made the objection that the judgment of affirmance had become final by reason of the failure of the court to file an order in writing signed by five justices, as provided by section 45 of the Code of Civil Procedure. The court, nevertheless, proceeded upon rehearing to reverse the judgment ap-

7 Cal. Code Civ. Proc., § 45.

8 In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028.

9 Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359, But this case appears to be in conflict with In re Jessup, 81 Cal. 472, 477, 485, 21 Pac. 976; 22 Pac. 742, 1028.

10 77 Cal. 63, 11 Am. St. Rep. 235, 18 Pac. 808.

pealed from, and its own previous judgment, merely remarking in response to the objection to the order: "The position as to the power of the court to grant a rehearing, and the sufficiency of the order granting it, do not require special notice." The same objection was made, under similar circumstances, in the important case of Lux v. Haggin,[11] but without waiting for a reargument, and was promptly overruled. In the Jessup case,[12] the whole subject was given careful consideration and discussed by Chief Justice Beatty, delivering the opinion of himself and five associate justices, Justice Works dissenting. The result of the decision is as above stated. The whole matter rests with the court, subject to be regulated by court rules.

All of said section 45 is contained in the constitution, except the last clause, reading as follows: "And every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases, the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing." In the Jessup case, the course pursued was directly contrary in two respects, to the provision above quoted; that is, the idea of the finality of the decision was repudiated, and the order was not by any written order signed by any justice. The rehearing seems, however, to have been ordered by five justices, whereas, in the case of Lux v. Haggin, only four concurred in ordering it. The question of the number of justices was given equal, if not, indeed, special, consideration, however, in the opinion. The chief justice, after quoting the statutory provision, and reviewing prior decisions of the court, said, in part: "The jurisdiction of this court is derived from the constitution, and can be neither enlarged nor abridged by the legislature. What it was in the beginning, it remains, and it must remain until the constitution itself is changed. If the constitution has denied to this court the power to grant rehearings in causes that have been decided in bank, the legislature cannot confer the power. If the constitution has conferred the power, the legislature cannot take it away, or by pretense

11 69 Cal. 255, 10 Pac. 674.

12 81 Cal. 405, 22 Pac. 871.

of regulating its exercise, substantially impair it. And whatever matters are, by the constitution, committed to the jurisdiction of the court, the court may, by a constitutional majority—that is to say, by the voice of four of its seven justices—decide. The legislature has no more right to decide a matter within our jurisdiction, unless five justices subscribe an order in writing than we should have to require all acts of the legislature to be subscribed by two-thirds of the members of each house. The constitution has conferred the power of deciding all matters within our jurisdiction upon a majority of the court; the legislature cannot require more than a majority. . . . . The framers of the constitution, in authorizing the supreme court to sit in two departments, made it absolutely necessary that the relations of the departments to the court, and the extent of their dependence upon it, should be exactly defined. Without express provision as to the effect and conclusiveness of department decisions, we should have had two independent supreme courts, following, possibly, two conflicting lines of decision. To prevent this inconvenience in the only way it could be prevented, department decisions were made conclusive only upon condition that a rehearing in bank should not be ordered. . . . . That this is an attempt to impair the constitutional power of the court seems to admit of no doubt. The legislature may have the right to prescribe the time for the issuance of remittitur upon the judgments of this court, and if so, it could, by making provision on that subject, limit our power—as to time—to grant rehearings. But for forty years the time of issuing the remittitur has been left to the court to regulate; and rules have been made fixing the period after judgment during which the remittitur should be retained. During such period, it has been held without question that the jurisdiction of the court to make any proper order in the case was preserved. It would be very remarkable if it should now be discovered that this court has, for forty years, been acting upon an erroneous view as to the proceeding by which its jurisdiction over a cause is terminated."

The following summary of the views expressed by the learned chief justice, is made a part of the opinion: "1. The perfecting of an appeal gives us jurisdiction of a cause, and that jurisdiction lasts until a remittitur is regularly issued;

2. While the cause remains subject to our jurisdiction, we have the power derived from the constitution to grant a rehearing after judgment, just as we have the power independent of legislative enactment to reverse, or modify the judgment of the inferior court and enforce our own judgments; 3. By the constitution, a majority consisting of four justices may decide any matter within our jurisdiction; and an act of the legislature requiring more than four justices to concur in a decision is unconstitutional."

In the cases thus far noticed, the original hearing was by the court in bank. Section 45 contains one other provision not directly involved in any of these cases, namely, that relating to cases where there has been a judgment in department and subsequently a rehearing in bank; and as to these, it is provided that the judgment of the court in bank shall be final, "unless," etc. In Austin v. Pulschen,[13] however, as appears from the brief of counsel for the appellant, found in the report, there had been a judgment of reversal in department, and the rehearing was upon the hearing in bank granted thereon, and resulted in an affirmance of the judgment of the lower court. The court answered the objection by referring to and adhering to the decision in the Jessup case.

These decisions render all existing statutory provisions, on the subject of rehearing invalid, or at least superfluous; and it only remains to examine the practice prescribed by the rules. It is to be noted, however, that one of the rules adopted in 1892, subsequently to the Jessup case conforms to the invalid provision of section 45, to the extent of requiring the justices by whom a rehearing is granted to sign the order therefor.

§ 726. Rehearing and hearing in bank distinguished.

It will be noted that the provisions for rehearing, and those for hearing in bank before judgment in department, are found in the same paragraph; but they are very different proceedings. The petitioner for a rehearing assumes the burden of showing some error in law or mistake as to the contents of some part of the record of sufficient importance to render a re-examination of the case advisable. The reasons for a hearing in bank of

13 112 Cal. 528, 44 Pac. 788.

a cause pending in department must necessarily be very different from these. Usually, the importance, or novelty, or difficulty of the issues are the grounds urged for a hearing in bank, before judgment in department.

§ 727. Proceedings "for" and "upon" rehearing and hearing in bank.

The rules of the supreme court of California governing herein are: Rule 28, reading as follows: "1. Applications, made before or after judgment pronounced by a department, that a cause shall be heard and decided by the court in bank, must be made upon printed petition, addressed to the chief justice of the court, setting forth the question involved in the cause and the reasons why it should be heard by the court in bank. If made before judgment, the petition must be filed with the clerk of the court at least ten days before the clerk makes up the calendar. And if made after judgment is pronounced by either of the departments, within twenty days after such judgment. The times herein prescribed shall not be extended by the chief justice or any of the associate justices or the court; and the clerk shall not file a petition after such times have expired. In case of judgments, the petition shall operate as a stay of proceedings until it shall be determined"; Rule 2, reading as follows: "A cause submitted to a department, without oral argument, shall be deemed to be a waiver of an oral argument of the same in bank, if for any reason the same is thereafter ordered to be heard in bank; and when the order that the cause be heard in bank is made, the same shall be at once submitted for decision, unless otherwise ordered by the court"; and Rule 30, subdivision 1, reading as follows: "All orders granting rehearings, or for hearing in bank causes decided in departments, shall be signed by the members of the court assenting thereto, and filed with the clerk."

The filing of a petition for a rehearing is not therefore a matter of right, not being given by statute, and being left by the constitution within the discretion of the court, to be governed and limited by its rules. But the court, equally with the litigants is bound by them until they are abrogated. They are to be construed as are statutes.[14]

14 Hanson v. McCue, 43 Cal. 178.

Only matters in the record upon which the appeal was heard can be properly urged for a rehearing.[15]

It is observable that the rules are in very positive and mandatory terms, which must be accepted as so many conditions, to be strictly complied with.

The petition must be filed and the question of a rehearing disposed of before the remittitur is issued; hence, it behooves the petitioner to file his petition at the earliest moment practicable, after the decision is rendered. The court has just thirty days, less the time it takes to prepare and file the petition, within which to consider and decide the matter.[16] The question of time was not so important before the rule with reference to issuance of the remittitur. In the absence of such rule the supreme court would have power to extend the time.

While the constitution says nothing about rehearings upon hearings in bank, it does limit the time for hearings in bank, after judgment in department, to thirty days. But rule 28 limits the time for this to twenty days for filing the petition. This limitation has in view the giving of the remaining ten days before issuance of the remittitur for considering the petition. Special provision is made against any extension of this time, and it applies to petitions for hearing in bank before judgment in department, the petition for which must be filed "at least ten days before the clerk makes up the calendar." The calendar is made up, according to rule 4, thirty days before the commencement of the term; so that such petition must be filed at least forty days before the first day of the term.

15 See In re Seydel's Estate, 14 S. Dak. 115, 84 N. W. 397; ante, § 671.

16 See Rhea v. Surryhne, 39 Cal. 581; Hanson v. McCue, 43 Cal. 179; Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929. See, also, Durgin v. Neal, 82 Cal. 595, 23 Pac. 133; Durgin v. McNally, 82 Cal. 595, 23 Pac. 375; holding that although petition for rehearing is filed within thirty days after the judgment of the department was pronounced, if it does not reach the hands of the court until after the expiration of the period of thirty days allowed by the constitution for ordering a rehearing, the petition must be denied, irrespective of its merits. For Oregon practice, see Hammer v. Downing, 39 Or. 504, 65 Pac. 17, 990, 64 Pac. 651, 67 Pac. 30. The strict rule as to time for filing petitions and motions for rehearings is observed in other

An order granting a rehearing, after the thirty days fixed by the constitution, is void.[17] And, since by the constitution the supreme court is open for the transaction of judicial business on holidays, the provision of the Code of Civil Procedure on the subject of holidays, terminating the period within which an act may be done, was held not applicable where things are to be done within a limited period in the supreme court.[18]

§ 728. Rehearings after decision in original proceeding.

An idea once prevailed that after the decision of the supreme court in an original proceeding therein the proper procedure for a review was by motion for new trial. But it is now well settled that a petition for rehearing should be presented in such cases.[19] The form does not vary from that employed in appealed cases; and the time within which it may be presented is usually discretionary with the court. If there be no special rule on the subject, the time fixed for filing such petitions in appeal cases would probably be held to govern. And, in such proceeding, no ground not submitted to the court can be urged for rehearing; and if upon the argument any issue of fact is waived, and the question presented is one of law, the counsel cannot, after a decision on the point of law, have a rehearing on the ground that there is a question of fact which should be determined.[20]

§ 729. Motions to amend and to correct mistakes in the record.

A party may not require a rehearing but may find some amendment of the order or direction of the court desirable.

states: See Kimpton v. Jubilee Placer Min. Co., 16 Mont. 379, 41 Pac. 137, 42 Pac. 102; Dempsey v. Billinghurst, 8 S. Dak. 86, 65 N. W. 427; Bank of Chadron v. Anderson (Wyo.), 49 Pac. 406.

17 Adams v. Dohrman, 63 Cal. 417, where the thirtieth day was Sunday.

18 Adams v. Dohrman, 63 Cal. 417; Herrlich v. McDonald, 83 Cal. 506, 23 Pac. 710.

19 Granger's Bank of California v. Superior Court, 101 Cal. 198, 35 Pac. 642; Matter of Philbrook, 108 Cal. 14, 40 Pac. 1061; People v. George, 3 Idaho, 108, 27 Pac. 680.

20 Atherton v. Supervisors of San Mateo County, 48 Cal. 157.

The grounds of the application therefor is usually some misprision of the clerk, or some mistake or misapprehension on the part of the court. It seems reasonable that the application for this purpose might be in the form of a motion; but motions are only heard under rule 20 on the first Monday in each month, and this might not afford sufficient time prior to the date when the remittitur must issue. At any rate, amendments and corrections are usually sought in the form of a petition as for a rehearing in bank, and are governed by the same rules.[21] The power to amend appears to have been carried to an extreme in a Washington case,[22] amounting to a resumption of appellate jurisdiction and a reversal of the decision after it had been exhausted in the particular case. It was held that where a judgment against an appellant had been reversed on the ground that the record showed want of proper service of summons upon him, and the respondent on petition for a rehearing sent up a corrected transcript showing that appellant had been duly served and the failure of the record to show that the fact had been due to a mistake of the clerk in transcribing the return of such service, the respondent was entitled to have the reversal set aside and an order entered affirming the judgment.[23] In the same state the power to recall the remittitur after its issuance, for the purpose of correcting the order or judgment on which it is issued, is freely exercised.

A different rule from that above discussed with reference to amendments applies, however, to mere clerical errors. They may be corrected at any time. In Swain v. Naglee,[24] the appeal was decided at the January term 1861, and the motion to amend the judgment was made at the October term. The remittitur having been issued in due course, the cause was called

21 See Gray v. Gray, 11 Cal. 341; In re Levison, 108 Cal. 450, 459, 41 Pac. 483, 42 Pac. 479.

22 Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

23 Titlow v. Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406. The jurisdiction seems also to be rather freely exercised in Oregon. See Smith v. Wilkins, 31 Or. 421, 51 Pac. 438.

24 19 Cal. 127. See, also, Fallon v. Brittain, 84 Cal. 514, 24 Pac. 381, as to power of courts generally to correct records where it can be done by the record; also cases there cited.

for trial in the lower court, when it was discovered that the judgment of the supreme court, as entered, affirmed the judgment below, instead of affirming the order granting a new trial. Thereupon the lower court stopped the proceedings. The supreme court in granting the motion to amend, said: "The entry here of the affirmance of the judgment was, as clearly appears from the context, designed to apply to the order granting the motion for a new trial. This error—if it be one, taking the whole proceeding together—is readily correctible by the record; and all courts have the power to amend clerical errors and enter a judgment nunc pro tunc, when the record itself discloses the error; and this, though the term has elapsed at which the entry was made."

§ 730. Modifications without rehearing—Extensive meaning of latter term.

In consonance with the elaborate consideration of the subject of rehearings, and of the powers of the court over its judgments, prior to the expiration of the period of thirty days fixed in the constitution in the Jessup case, it may be now considered well established that whatever the court may do upon a petition for, and upon a formal rehearing in open session of the court, it may do upon its own motion, without these, or any formalities whatever. This proposition was fully stated and the reasons in its support were learnedly advanced in Niles v. Edwards,[25] as follows: "Under the constitution of this state, there is but one supreme court. and the jurisdiction which is vested in it may be exercised either in bank or in department; and in either case its exercise is of equal import. The jurisdiction of the court in bank and in department is co-ordinate, and although in bank it may exercise a control over the action of a department, yet such jurisdiction is supervisory, rather than appellate. As the constitution requires the court to 'always be open for the transaction of business,' any order that is made by a majority of the justices is an order of the court in bank, and the exercise, by the justices of this supervisory control of the action of a department is the action of the court

25 95 Cal. 41, 42, 45, 30 Pac. 134. See, also, Langley v. Vall, 54 Cal. 435; Aldrich v. Willis, 55 Cal. 86; Pulliam v. Bernett, 55 Cal. 368.

in bank. Nor is it necessary for the exercise of this supervisory jurisdiction that a distinct order be made that the cause be heard in bank. The modification, by the court, of the action of a department implies that it has already given to such action its consideration, and includes or dispenses with the formal order therefor. The provision in the constitution that within thirty days after judgment has been pronounced in a cause by a department an order may be made that it be heard and decided in bank, is merely a provision that the cause may, after such judgment, be considered and determined by the court in bank, and does not necessarily imply that an additional and oral argument must be made or listened to before it can be so considered or determined. The term 'heard,' as here used, is taken from the practice in equity procedure, and corresponds to the term 'trial,' as used in cases at law. It signifies the consideration and determination of a cause by the court or by a judge, as distinguished from a trial of a cause, which is a term more properly predicated of its determination by a jury. . . . . In the exercise of its power to hear a cause in bank after a judgment thereon has been pronounced in department, the court is not limited to an application therefor by a party to the cause, or to the grounds upon which such application may be made, but this power may be exercised by it upon its own motion, irrespective of such application. The department that pronounced the judgment may itself modify or vacate the same, as may also the court in bank, or a majority of the justices of the court. An application that a cause may be so heard, whether addressed to the chief justice or to the court, is in fact an application to the court in bank; and it has been the invariable practice of the court since its organization to consider such applications when convened in bank. Although the application may be granted upon the order of the chief justice with the concurrence of two associate justices, yet the order is none the less the result of a consideration by the court in bank, and is to be regarded as the action of the court in bank, by virtue of the provision in the constitution that an order so made shall have the same effect as if made by a majority of the members of the court." In several prior cases, the power to make considerable modifications had been exercised, without

question as to its possession. In Pollard v. Putnam,[26] a judgment had been rendered by the court in department reversing the cause, and remanding it to the court below with instructions to enter judgment in favor of the defendant, and thereafter the court in bank, without making any order that the cause be heard in bank, modified the judgment by remanding the cause for a new trial. So, in Faulkner v. Hendy,[27] the court in bank made a radical change in the judgment that had been pronounced in department, without ordering the cause to be heard in bank. And the department has itself modified its own judgments.[28]

§ 731. Disqualification of justices.

The reports disclose many instances in which justices of appellate courts, were disqualified, by reason of interest, relationship, or having acted as counsel for a party.

Where they do not hear the argument, in cases where there is oral argument, it is the usual course for those who do hear it to ask consent of counsel for the absent justices to participate in the decision; and there is probably no instance of record where such consent was withheld. The constitutional provision on the subject [29] appears to disqualify those who do not hear oral argument, if there be oral argument, from participating in the decision. It was construed in Niles v. Edwards,[30] as seen in the extensive quotation from that case in the last preceding section.

§ 732. Reargument on account of equal division of court.

Since appellate courts, probably without an exception, consist of an odd number of justices, it is obvious that unless there be a vacancy, or a disqualification of one or more of them, or inability from any cause to act, there cannot be an equal division of the court upon any question. Nevertheless, an equal division sometimes occurs, on account of the existence of one

26 54 Cal. 630. See, also, Withers v. Little, 56 Cal. 373, and People v. Miles, 56 Cal. 402, where similar action was taken.

27 80 Cal. 638, 22 Pac. 401.

28 O'Connor v. Flynn, 57 Cal. 297.

29 Cal. Const., art. 6, § 2.

30 95 Cal. 41, 43, 30 Pac. 134.

or more of the above causes. If the disqualification consists in the fact of a vacancy on the bench, or of a failure to hear argument, it may be removed by a reargument, and a resubmission in due course, or after the filing of the vacancy.

In case of an equal division which cannot be obviated by reargument, if the question be upon the reversal or affirmance of the judgment, on appeal or writ of error, the judgment stands affirmed.[31]

The general rule seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division; but, where the motion is in arrest of the progress of the action, an equal division is equivalent to a denial of the motion, and the case proceeds as if the motion had not been made.[32]

31 Ayres v. Bensley, 32 Cal. 620; Case of the Antelope, 10 Wheat. 66; Etting v. Bank of United States, 11 Wheat. 59.

32 Ayres v. Bensley, 32 Cal. 620, 634; Goddard v. Coffin, Davies, 381, and where the division occurs on a motion in arrest of judgment in a trial court, judgment must be entered on the verdict: United States v. Worrall, 2 Dall. 384, 388. If on a motion for new trial it must be denied: United States v. Daniels, Wheat. 542; Cahill v. Binn, 6 Binn. 99. If on the admission of testimony it stands rejected: Ayeres v. Bensley, 32 Cal. 620, 624.

CHAPTER 44.

ISSUANCE AND RECALL OF REMITTITUR.

§ 733. Certifying result of appeal to lower court—Remittitur.
§ 734. Recall of remittitur.

§ 733. Certifying result of appeal to lower court—Remittitur.

The disposition of the appeal is commonly spoken of as the "judgment" of the appellate court. More properly speaking, it is an order. Even where, instead of an outright reversal or affirmance, that court modifies the judgment of the lower court, the actual change is merely directed to be made, and is not directly made by the appellate court. It is made, however, by the lower court, as a judicial agency of the appellate court, and, in that sense, the new judgment, so entered, is to all intents and purposes that of the appellate court.

In practice an outright affirmance or reversal, with or without a direction for a new trial, is accomplished by adding the remittitur to the judgment-roll in the lower court, and spreading it on the minutes of the court. But, in the case of a modification, something more is required. In that case, a new and different judgment must be entered. Theoretically, it may be entered by the clerk pursuant to the direction of the higher court. Usually, however, some attorney interested in having the new judgment entered makes a draft of what he thinks it should be, and submits it to the judge, who, when in conformity with the direction of the higher court, causes it to be entered.

The remittitur is an instrument in writing, containing the result of the appeal, as declared by the appellate court, certified by its clerk. In issuing and transmitting it, the clerk, being in California, a state officer, subject to statutory control, proceeds under the code provision, reading as follows:[1] "When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judg-

1 Cal. Code Civ. Proc., § 958.

ment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and, against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal." Standing alone, this provision would require the clerk to issue the remittitur immediately following the decision; but it must be read in connection with the constitutional provision,[2] allowing thirty days for the disposition of the matter of rehearing, and the rule of court on the same subject.[3]

Where the remittitur is properly and regularly issued it devests the appellate court of jurisdiction.[4] The reasons for

2 Art. 6, § 2, Cal. Const. 1879. See Hog's Back Cons. M. Co. v. New Basil G. M. Co., 65 Cal. 22, 23, 2 Pac. 489, holding that a judgment by department is not final until the expiration of thirty days from its rendition, unless the chief justice and two associate justices shall approve it, and a remittitur should not be issued for thirty days thereafter.

3 See ante, § 725 et seq.

4 People v. Sprague, 57 Cal. 148; Blanc v. Bowman, 22 Cal. 24, 26; Leese v. Clark, 20 Cal. 387; Richardson v. Chicago Packing etc. Co., 135 Cal. 311, 67 Pac. 769; Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Ward v. Springfield Fire etc. Ins. Co., 12 Wash. 631, 42 Pac. 119; State v. Faulds, 17 Mont. 140, 42 Pac. 285. In Richardson v. Packing Co., supra, McFarland, J., delivering the opinion, said: "When a remittitur has gone down to the lower court, this court has lost jurisdiction of the case, unless it has been issued inadvertently or some fraud or imposition has been practiced upon the court or the opposite party; and in such case the remittitur is not recalled upon the theory that this court can resume a jurisdiction once lost, but upon the principle that an order made inadvertently, or obtained by fraud, may be treated as a nullity, and the case considered as still pending in the court. (See Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008, and cases there cited.) But there is nothing in the case at bar that brings it within this principle. This court, therefore, had lost jurisdiction of the above-entitled cause when the motion to recall was made."

such loss of jurisdiction are thus clearly stated in Leese v. Clark:[5] "The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. The court cannot recall the case and reverse its decision after the remittitur is issued."

§ 734. Recall of remittitur.

If, however, the issuance of the remittitur has been the result of mistake, inadvertence, or fraud, it will be treated as a void act, which the court will proceed to rectify, upon a showing of the facts. This was done in Roland v. Kreyenhagen,[6] The court by Chief Justice Sanderson, after stating the facts, reviewing authorities, and stating the general rule as to loss of jurisdiction by the issuance of the remittitur, said: "But this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party; for if it appears that such has been the case, the appellate court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be devested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree." So, if a party to the appeal die, after submission, but the fact is not brought

5 20 Cal. 387.

6 24 Cal. 52, 59. To same effect, Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008; Ex parte Gallagher, 101 Cal. 113, 35 Pac. 449; Titlow v. Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406.

to the attention of the court until after the issuance of the remittitur, it will be recalled, the decision and opinion set aside, and entered as of the date of the argument, and another remittitur directed to issue forthwith.[7]

But the remittitur will not be recalled for a trivial error, nor for other cause than the prevention of a substantial injury,[8] With respect to those entitled to move for a recall, the court is by no means technical; and it was held that a purchaser of all the property involved in an action of partition was the legal representative of all the nominal parties to the action, within the meaning of section 473 of the Code of Civil Procedure, and, under section 385 of that code, had control of the action, both in the court below and in the supreme court, and had the right to move to recall a remittitur obtained by fraud of nominal parties to the record, in taking steps adverse to his rights.[9]

In all such cases the reason assigned by the court for its action was that the order or judgment had been irregularly made; that is, made upon a false suggestion, or under a mistake as to the facts of the case. And the remittitur was recalled where the court had directed that a petition for rehearing be granted, but by mistake the clerk entered an order denying the petition, and thereupon issued the remittitur forthwith. In this case the court said: "A mistake of this kind stands upon the same principle as a fraud, for it operates as a fraud upon the rights of the party injured by it."[10]

Upon an application to recall the remittitur under such circumstances, the inquiry is not limited to the records and minutes of the appellate court. The facts may be shown by affidavits, and the justices will avail themselves of their recollection of the true facts.[11]

7 Halloway v. Galliac, 49 Cal. 149.

8 Morrell v. Miller, 28 Or. 354, 43 Pac. 490, 45 Pac. 246; In re Treadwell, 111 Cal. 189, 43 Pac. 584.

9 Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008.

10 Vance v. Pena, 36 Cal. 328.

11 See two cases last cited.

If the purpose of the recall is to amend the remittitur by the insertion of a direction with respect to costs, the party liable may obviate it by paying the costs.[12]

According to the doctrine of Hanson v. McCue,[13] the deposit of a petition for a rehearing in an express office within ample time to have reached in due course of business the hands of the clerk in time, according to the rule of court, is equivalent to a filing of the petition within such time. And in such case the remittitur will be recalled and the petition considered. In the case just cited, the court said: "It seems that the counsel for respondent deposited his petition for rehearing in the office of the express company, in ample time to reach the clerk of this court within the period allowed by the rule for filing the petition, in the ordinary course of the business of the company. It also appears that this was the customary and most reliable means of transmission. Here, then, was no negligence on the part of counsel. He had performed fully, and in due time, all that he could be required to do in ordinary cases, and in the absence of notice that the petition had failed to arrive at its place of destination. He had dispatched it by the ordinary and best method; and we think that when counsel have fully completed their duties and have parted with the possession of the petition in the manner described, and within ample time for its conveyance to the court within the period limited by the rule, it should be construed to be thenceforward in the possession of the officer of the court to whom it was addressed. In contemplation of law, the petition was in the hands of the clerk, within the time limited by the rule, and if lost, may be supplied as other documents lost from the files of the court may be supplied. The petition being deemed to have been filed in time, the remittitur issued improperly. This was not through personal fault of the clerk, but was error in contemplation of law." But in such case—and perhaps the rule would be held to apply in every case of a motion to recall—the court will first examine the petition for a rehearing, or for other relief dependent upon a recall of the remittitur; and

12 Darker v. Garvey, 84 Cal. 590, 24 Pac. 929.

13 43 Cal. 178. An identical case was that of Bernal v. Wade, 46 Cal. 641.

if it is apparent as a result of such examination, that the court could not grant any relief, the application to recall will be denied. Thus, in Du Baker v. Carillo[14] the court, in denying the application, said: "We have examined and considered the petition for a rehearing and find nothing in it to shake our confidence in the correctness of our former ruling. It is unnecessary for us to determine whether there is a sufficient showing to justify us in recalling the remittitur, inasmuch as it would be a vain act to recall it when the proceeding would only result in an adherence to our former ruling on the merits of the appeal."

The proper practice in case a recall of the remittitur is desired in order to have the petition for a rehearing considered, is to accompany the application with the petition for a rehearing. If upon an inspection of the petition it is apparent that a rehearing cannot be granted, the remittitur will not be recalled, notwithstanding any mistake in issuing it. And the same rule would apply if a modification of the final order, or any other relief, were sought, which could only be granted upon a recall of the remittitur. Such application stands upon a similar footing as an application to set aside a default, with respect to a showing of merits. But without regard to the merits of the application, it must be presented within a reasonable time.[15]

14 52 Cal. 473, 475.

15 See. San Francisco v. Calderwood, 58 Cal. 355; Douglas v. Fulda, 59 Cal. 285.

CHAPTER 45.

APPEALS IN CRIMINAL CASES.

§ 735. Provisions governing civil cases generally applicable.
§ 736. Constitutional and statutory provisions.
§ 737. Appeals may be taken by either side.
§ 738. Of the record on appeal.
§ 739. Provisions limiting time for presenting bill of exceptions held to be merely directory.
§ 740. Presumptions arising upon the record.
§ 741. Presumption of injury from error.
§ 742. Disposal of the appeal.
§ 743. Effect of reversal on appeal by defendant.

§ 735. Provisions governing civil cases generally applicable.

Only the peculiarities of appeal in criminal practice can be here discussed. Most of the discussion of the subject of appeal up to this point is equally applicable to civil and criminal appeals. Some of the formalities, as well as labor, and practically all the expense, incidental to appeals generally, are omitted, or obviated in statutory provisions governing appeals in criminal cases. And even where the methods of taking appeals prescribed for civil actions and proceedings are not applicable to criminal cases, this does not exclude the application of analogous principles governing the remedy, in the absence of specific provisions on the subject. As to the time for appealing, and the method of instituting and perfecting the appeal, as well as the orders and proceedings from which an appeal may be taken, the provisions of penal codes and statutes control, where such provisions are found. As to matters of general practice, however, in the absence of such specific provisions, the rule and principles governing in civil cases may be freely resorted to.

§ 736. Constitutional and statutory provisions.

Appeals in criminal cases can only be taken and prosecuted according to statutory provisions governing that class of cases.

They cannot be prosecuted under provisions governing appeals in civil actions and proceedings, where statutes governing appeals in criminal cases are found.[1] This conforms to the general rule already stated, that the specific remedies for exercising appellate jurisdiction provided by statute are exclusive.[2] This also results from the condition of the common law, whereby no method of review by appeal was given.[3]

By section 4 of article 6, of the constitution of California, the appellate jurisdiction of the supreme court in criminal cases extends to "all criminal cases prosecuted by indictment or information in a court of record." By the Penal Code,[4] "either party in a criminal action, amounting to a felony, may appeal to the supreme court on questions of law alone." The Code of Civil Procedure,[5] following the constitution, limits the original jurisdiction of the superior court thus: "5. In all criminal cases amounting to felony, and cases of misdemeanors not otherwise provided for." From these provisions it is seen that there may be criminal cases—and in fact there are—of which the superior courts have exclusive original jurisdiction, in which no appeals can be taken to the supreme court.

But the casus omissus in section 1235 of the Penal Code, which, if given effect, would exclude appellate jurisdiction of offenses below the grade of felony, is not permitted to have that effect, as is fully shown elsewhere.[6]

§ 737. Appeals may be taken by either side.

The Penal Code of California allows appeals to both the people and the defendant, upon certain questions, those given to the state being much more limited than those given to defendants. An appeal may be taken by the people: 1. From an order setting aside the indictment or information; 2. From

1 State v. Wallace, 41 Ind. 445; Sturm v. State, 74 Ind. 278.

2 See ante, § 466; Frazier v. State, 106 Ind. 562, 7 N. E. 378.

3 See ante, §§ 462-466; Regina v. Murphy, L. R. 2 P. C. 535; Regina v. Bertrand, 10 Cox C. C. 618.

4 Cal. Pen. Code, § 1235.

5 § 76.

6 See ante, § 478.

a judgment for the defendant on a demurrer to the indictment or information; 3. From an order granting a new trial; 4. From an order arresting judgment; 5. From an order made after judgment, affecting the substantial rights of the people; 6. From an order of the court directing the jury to find for the defendant.[7] This provision is literally construed. An appeal cannot be maintained on behalf of the people from an order made by the superior court of its own motion, dismissing a criminal action.[8] And an appeal taken by the people from an order setting aside an information will be dismissed by the appellate court of its own motion for want of jurisdiction, although the objection is not raised by respondent.[9]

7 Cal. Pen. Code, § 1238.

8 People v. More, 71 Cal. 546, 12 Pac. 631. In this case the court, in granting the motion to dismiss the appeal, said: "The respondent moves to dismiss the appeal, upon the ground that the order is one from which no statutory right of appeal is given to the people. It is certainly not one of the enumerated cases in which a right of appeal is given by section 1238 of the code, and there is no other statutory provision giving such right. It is contended, however, by appellant, that as the constitution gives this court appellate jurisdiction of questions of law arising 'in all criminal cases prosecuted, by indictment or information, in a court of record,' therefore there is no jurisdiction here, although no statutory machinery for the appeal has been provided, as held in People v. Jordan, 65 Cal. 644, 4 Pac. 683. But the order in question is, in its nature and character, one from which the people cannot appeal. The power under which the order was made is substantially the same as that held by the attorney general in England, and by the prosecuting officer in many of the American states, to enter a nolle prosequi. The court, for the purpose of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, as the attorney general in England holds the power to enter a nolle prosequi by virtue of the office and the law; and it is exercised upon official responsibility. The court having acted for the people, and under express power granted by them to so act in their criminal prosecutions, there is no appeal on their part for such action. Of course, if a defendant should appeal from such an order, as he well might if it were made after the impaneling of a jury, a different case would be presented: Commonwealth v. Tuck, 20 Pick. 365."

9 People v. Richter, 113 Cal. 473, 45 Pac. 811; People v. Higgins, 114 Cal. 63, 45 Pac. 1004.

An appeal may be taken by the defendant: 1. From a final judgment or conviction; 2. From an order denying a motion for a new trial; 3. From an order made after judgment, affecting the substantial rights of the party.[10]

The Penal Code of California makes no provisions for an entry of judgment on demurrer, other than the entry of an order upon the minutes. The entry of such an order in the minutes is a judgment, and, where a demurrer to an indictment is sustained, an appeal from such decision is effectual, although the notice of appeal states that the appeal is taken from the "order" sustaining the demurrer.[11]

§ 738. Of the record on appeal.

The rule that the appellant has the burden of affirmatively showing error applies equally in criminal, as in civil, cases. The rule is susceptible of as numerous illustrations under the one head as the other. There is no perceivable difference in the application of the rule by reason of the fact that it is a crim-

10 Cal. Pen. Code, § 1237. Section 1240 prescribes the method of taking the appeal. It is held that sections 284 and 285 of the Code of Civil Procedure have no application to criminal cases, and that a notice of appeal may be signed by any attorney of the court authorized by the defendant: Ex parte Clarke, 62 Cal. 490. It is no objection to the jurisdiction of the supreme court to entertain the appeal that the lower court exceeded its jurisdiction in the particular case: People v. Pingree, 61 Cal. 141. Order made after the affirmance of a capital conviction, fixing the time and place of execution, is an appealable order, and an appeal therefrom cannot be considered upon its merits upon a motion to dismiss, or be dismissed upon the grounds that it is frivolous: People v. McNulty, 95 Cal. 594, 30 Pac. 963. But no appeal lies in a criminal case from an order denying a motion in arrest of judgment: People v. Henry, 77 Cal. 445, 19 Pac. 830; People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; People v. Cline, 83 Cal. 374, 23 Pac. 391; People v. Dolan, 96 Cal. 315, 31 Pac. 107; People v. Majors, 65 Cal. 100, 3 Pac. 401; People v. Sansome, 98 Cal. 235, 33 Pac. 202. Nor will an appeal lie from a judgment on a plea of former conviction, such not being a final judgment: People v. Majors, 65 Cal. 100, 3 Pac. 401.

11 People v. Jordan, 65 Cal. 644, 4 Pac. 683. To same effect, People v. Long, 121 Cal. 494, 53 Pac. 1097, holding bill of exceptions necessary upon such appeal.

inal case, rather than a civil case.[12] And when an appeal in a criminal case is taken only on the judgment-roll, which contains the written instructions presented and indorsed as given or refused, but also shows that oral instructions were given, the nature or contents of which do not appear as part of the record, an instruction refused cannot be reviewed. Appellant must either show that such instruction was not given elsewhere, or give the respondent an opportunity to show that it was given.[13]

If on appeal from a judgment of conviction the bill of exceptions merely states that each party introduced evidence to sustain the issue on their respective parts, without any further setting out of the testimony, an examination as to the facts is thereby precluded.[14] In short, nothing can take the place of omitted evidence, except a statement in the bill that there was no evidence, or such a statement or condition of the record as warrants the inference that none of it has been omitted. It was held that an instruction acknowledging error, and directing the jury to disregard the evidence, was not ground for reversal, it not appearing in the absence of the evidence that the error was harmful or affected a substantial right.[15] So, if the appellant claims that there was error in admitting the transcript, because the original notes were not filed, he must show affirmatively that they were not filed.[16] Nor will an instruction be

12 Evidence not considered, though in the transcript, unless embodied in a bill of exceptions or identified in some other mode recognized by law: People v. Fredericks, 106 Cal. 554, 39 Pac. 944; People v. Mahoney, 77 Cal. 529, 20 Pac. 73; State v. Millis, 19 Mont. 444, 48 Pac. 773. And not sufficient if merely contained in the assignment of errors: People v. Bemmerly, 98 Cal. 299, 33 Pac. 263. Question of sufficiency not reviewed where transcript does not purport to contain all the evidence: People v. Carroll, 80 Cal. 153, 22 Pac. 129; People v. Tonielli, 81 Cal. 275, 22 Pac. 678; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, holding that where the record does not contain all of the defendant's examination in chief, it will not be presumed that the cross-examination was improperly allowed upon the matter not testified to by the defendant in chief.

13 People v. Von, 78 Cal. 1, 20 Pac. 35.

14 People v. Dye, 62 Cal. 523.

15 People v. Olsen, 80 Cal. 122, 22 Pac. 125.

16 People v. Grundell, 75 Cal. 301, 17 Pac. 214. In this case the

held unwarranted in the absence of the evidence, unless erroneous in any conceivable state of the evidence.[17] Nor can there be a reversal upon appeal because of the failure of the prosecution to bring the defendant to trial within sixty days after the filing of the information, where the bill of exceptions is entirely silent as to the orders of the court postponing the trial and refusing to dismiss the prosecution, and there is nothing in the transcript upon appeal as to the orders, except the record entries made by the clerk of the trial court, which fail to show any objection by the defendant to the continuance, or that good cause for denying the motion to dismiss was not shown by the prosecution.[18] Under the same rule, a specification of error in a bill of exceptions in a criminal case, as to certain remarks claimed to have been made by the district attorney in his clos-

court said: "At the trial the prosecution read in evidence, against the defendant's objection, the shorthand reporter's transcript of the testimony of one Lewis, given before the committing magistrate, and this is assigned as error. Section 869 of the Penal Code provides for the taking down of such testimony 'as a deposition,' and that 'the transcript of the reporter appointed as aforesaid, when written out in longhand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings.' And the section goes on to provide that 'the reporter shall, within ten days after the close of such examination, if the defendant be held to answer the charge, transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county or city and county in which the defendant was examined, and shall, in all cases, file his original notes with said clerk.' In the case of Reid v. Reid, 73 Cal. 206, 14 Pac. 781, it was held by department two that section 273 of the Code of Civil Procedure did not render the unfiled transcript of the reporter admissible as evidence. But that case is not similar to this. In the first place, the transcript in that case was not filed, and stress was laid upon that circumstance in the opinion. In this case it was filed. Such a transcript, when filed by the officer in pursuance of a provision of law, may be regarded as in the nature of an official entry: Code Civ. Proc., § 1920. The publicity of such a record is a safeguard against the dangers mentioned in Reid v. Reid. Such a document is quite a different thing from the unfiled and unsworn certificate of one who may no longer be an officer, produced at the trial from the pocket of one of the parties."

17 See People v. Williams, 75 Cal. 306, 17 Pac. 211.

18 People v. Douglass, 100 Cal. 1, 34 Pac. 490.

ing argument, to the jury, outside the evidence in the case, and prejudicial to the defendant, will not be considered where the bill of exceptions does not show, other than by such specifications, that the district attorney did, in fact, make such remarks.[19]

But a bill of exceptions is to be read in connection with the record, of which it forms a part, and a document set out in another part of the record, which is sufficiently identified as the one referred to in the bill of exceptions, may be deemed a part of it, and considered in passing upon the merits of an exception reserved by such bill.[20]

The written instructions of the court, if any, are part of the judgment-roll and should appear therein,[21] and should not be duplicated in the bill of exceptions.[22] Any oral charge of the court is required to be taken down by the court reporter.[23] They should appear in the bill of exceptions with a statement showing the action of the court thereon.[24] But the reporter's notes are not conclusive on the court, whose duty it is, in settling the bill of exceptions, to insert what he actually said to the jury, as a substitute for what the reporter may have erroneously stated was said.[25] In short, the bill should con-

19 People v. Faulke, 96 Cal. 17, 30 Pac. 837.

20 People v. Wallace, 94 Cal. 497, 29 Pac. 950.

21 See Cal. Pen. Code, § 1207, designating the following papers as constituting the judgment-roll: 1. The indictment or information, and a copy of the minutes of the plea or demurrer; 2. A copy of the minutes of the trial; 3. The charges given or refused, and the indorsements thereon; and 4. A copy of the judgment.

22 People v. Cole, 127 Cal. 545, 59 Pac. 984; People v. Gibson, 106 Cal. 458, 39 Pac. 864, holding also that where an instruction appears in an erroneous form in the bill of exceptions and in a different form in the judgment-roll, which is not erroneous, the form of instruction as given in the judgment-roll will be taken as correct upon appeal.

23 Cal. Pen. Code, § 1093, subd. 6.

24 People v. Clark, 106 Cal. 32, 39 Pac. 53.

25 People v. Cox, 76 Cal. 281, 18 Pac. 332. An unauthenticated copy of the oral instructions of the court, not approved by the judge or certified by the reporter, cannot derive verity from being inserted by the clerk in the judgment-roll: People v. O'Brien, 78 Cal. 41, 20 Pac. 359.

tain all that is material and not embraced in the judgment-roll.[26]

The notice of appeal is not part of the judgment-roll. It should appear in the transcript, which must also show service. If service be not shown, the appeal will be dismissed.[27] And if insufficiency of evidence be one of the grounds relied upon, it should be so specified in the bill of exceptions, though it is not necessary in a criminal case to specify the particulars of insufficiency.[28]

§ 739. Provision limiting time for presenting bill of exceptions held to be merely directory.

The requirement of the statute with reference to the time of presenting bills of exceptions in criminal cases is less strictly enforced than in civil cases. The provision on the subject in the California code is held to be directory merely, notwithstanding its mandatory form. The rule is that if the trial judge has actually settled the bill, the supreme court will not refuse to consider it, though presented after the time designated in the statute; but, if the judge has refused to settle it when presented too late, the supreme court has no power either to consider it, or to compel its settlement.[29] Nevertheless, it is the

26 See People v. O'Brien, 88 Cal. 483, 26 Pac. 362, holding that return of sheriff upon venire under which trial jury was summoned in a criminal case is not a part of the judgment-roll, and constitutes no part of the record upon appeal from the judgment when not incorporated in a bill of exceptions: People v. Von, 78 Cal. 1, 20 Pac. 35, holding that a manuscript purporting to be the oral charge of the court, which is not incorporated in a bill of exceptions, or authenticated in any way provided by law, cannot be considered for the purpose of determining whether a written instruction presented and refused was or was not embodied in the oral charge. To same effect, People v. Beaver, 83 Cal. 419, 23 Pac. 321; People v. January, 77 Cal. 179, 19 Pac. 258; People v. Keeley, 81 Cal. 210, 22 Pac. 593; People v. Rogers, 81 Cal. 209, 22 Pac. 592; People v. Louie Foo, 112 Cal. 17, 44 Pac. 453; People v. McMahon, 124 Cal. 435, 57 Pac. 224, as to affidavits found in record.

27 People v. Bell, 70 Cal. 33, 11 Pac. 327; People v. Cole, 119 Cal. 668, 51 Pac. 1082.

28 People v. Crowley, 100 Cal. 478, 35 Pac. 84.

29 See People v. Almèndares, 136 Cal. 660, 69 Pac. 492; People v. Gonzales, 136 Cal. 666, 69 Pac. 487; People v. White, 34 Cal. 183,

duty of the judge to settle the bill, though presented after the statutory time, if the delay be shown to have been unavoidable or excusable.[30]

§ 740. Presumptions arising upon the record.

Upon a record which is defective, in respect of fullness and completeness, similar presumptions arise as on appeals in civil cases. In other words, upon appeal all presumptions, or intendments, are in favor of regularity of the action of the trial court. If, upon such appeal, without a bill of exceptions, any act of the court complained of, which might have been properly done with the consent, or at the request, of the defendant, will not be reviewed.[31] A great number and variety of illustrations could be given. A few will be found in the note.[32] There is a point, however, in every case, at which the burden of an

giving same construction to section 435 of Criminal Practice Act. Where a bill of exceptions is settled by the trial judge after the expiration of the statutory period allowed therefor the reasons which may have induced such action will not be inquired into on appeal, but will be presumed to have been sufficient: People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Lee, 14 Cal. 510.

30 Brown v. Prewett, 94 Cal. 502, 29 Pac. 951.

31 People v. Fowler, 88 Cal. 136, 25 Pac. 110; People v. Swafford, 65 Cal. 223, 3 Pac. 809; People v. Johnson, 88 Cal. 171, 25 Pac. 1116; People v. Douglass, 100 Cal. 1, 34 Pac. 490, holding that when the record upon appeal does not show that a continuance of a criminal cause was objected to by the defendant it will be presumed in favor of the action of the court below that the defendant consented to the order: People v. Curtis, 76 Cal. 57, 17 Pac. 941.

32 See People v. Holmes, 118 Cal. 444, 50 Pac. 675; People v. Collins, 105 Cal. 504, 39 Pac. 16; People v. Cline, 83 Cal. 374, 23 Pac. 391. presumption of presence of defendant; People v. Barton, 88 Cal. 176, 25 Pac. 1117, that nature of charge was stated to defendant; People v. Garcia, 25 Cal. 531, that if record does not show that charge was oral the supreme court will not presume that it was oral, but the presumption will be that it was in writing: People v. Wheatley, 88 Cal. 114, 26 Pac. 95, that transfer of case was regular; People v. Leong Sing, 77 Cal. 117, 19 Pac. 254, that defendant appearing of record by two names was equally known by both; People v. Johnson, 88 Cal. 171, 25 Pac. 1116; People v. Bourke, 66 Cal. 455, 6 Pac. 89; that charge to jury given orally was taken down by shorthand reporter: People v. Huff, 72 Cal. 117, 13 Pac. 168, that person appointed to take charge of the jury was officer properly qualified for that purpose.

affirmative showing shifts. Where a bill of exceptions, used on a motion for a new trial in a criminal case, specifies the insufficiency of the evidence to justify the verdict, it is the duty of the prosecution to have put into the bill some evidence, if any there be, to make it appear that there was proof of the participation of the defendant in the crime charged; and it will be presumed upon appeal that such specification is preceded by all the material evidence bearing thereupon.[33]

§ 741. Presumption of injury from error.

The rule as to the presumption of prejudice from injury, shown and not rebutted by the record, seems to be somewhat more liberal in favor of appellants in criminal than in civil cases. Whatever may be said in civil cases, injury will be presumed in a criminal case, unless the record shows affirmatively that the error was without prejudice to the defendant. Accordingly, in People v. Richards, [34] the court said: "It is thus plain that the instruction is erroneous. Upon its face it presents an unsound proposition of law. Viewed from any and every angle, it is unsound, for under no possible state of circumstances which the record might present, if the evidence was before us upon a bill of exceptions, can its legality be justified. The order denying a new trial is not appealed from, nor is there in the record any statement or bill of exceptions disclosing the evidence. Hence the court cannot say that the instruction is harmless. While error will not be presumed, injury from error will be presumed; and upon the record as it stands it is impossible for the court to say that no injury resulted to defendant from the giving of this instruction." And in People v. Kamaunu,[35] the court said: "And if it be admitted that there was error, the question then would be, Did the error affect the substantial rights of the defendant? If we cannot determine whether there was injury or not, then, since the defendant has not been tried as the law of the land directs, we must presume injury. For to be so tried is his right. But if

33 People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

34 136 Cal. 127, 128, 68 Pac. 477.

35 110 Cal. 612, 42 Pac. 1090. See, also, People v. Marshall, 112 Cal. 422, 44 Pac. 718; State v. Johnson, 26 Mont. 9, 66 Pac. 290; State v. Shadwell, 26 Mont. 52, 66 Pac. 508.

we can see that he has not been injured, the judgment will be allowed to stand."

§ 742. Disposal of the appeal.

In criminal, as in civil, cases, questions raised which go to the jurisdiction of the appellate court will be first considered. But the lack of jurisdiction will usually require to be very clearly shown, in order to obtain a dismissal, especially if the offense with which a defendant has been convicted be punishable with death or a long term of imprisonment. To warrant a dismissal, the irregularity must be substantial; otherwise, the appeal will not be dismissed.[36] Where, however, a defendant escapes from custody, and is at large when the appeal comes on for hearing, it will be ordered to stand dismissed, unless the defendant shall, within a specified time, return to the custody of the sheriff.[37]

The code, while probably adding nothing to the inherent constitutional powers of the supreme court, yet may be taken as a clear statement of th powers actually exercised by the court on such appeals. It provides, among other matters, as follows: "The court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."[38]

The rules on the subject of presenting arguments and filing briefs, already discussed as applicable, are recognized and enforced in a general way in criminal cases.[39] But where the case is regularly before the court with proper assignments of error in the record, such assignments will usually be investigated, especially in capital cases.[40]

36 Cal. Pen. Code, §§ 1248, 1249; People v. McNulty, 95 Cal. 594, 30 Pac. 963, holding, also, that appeal cannot be dismissed upon the ground that it is frivolous.

37 People v. Elkins, 122 Cal. 654, 55 Pac. 599; State v. Dempsey, 26 Mont. 504, 68 Pac. 1114.

38 Cal. Pen. Code, § 1260.

39 See ante, §§ 696-701; People v. Breen, 130 Cal. 72, 62 Pac. 408.

40 People v. Clark, 121 Cal. 633, 54 Pac. 147. See, also, People v. Busby, 113 Cal. 181, 45 Pac. 191. In the latter case the case was re-

Nothing is really necessary to be said upon the scope of investigation under this additional head, to what has been already stated at great length.[41] The supreme court has no jurisdiction to review questions of fact upon appeals in criminal cases; and it is useless for the briefs of counsel to discuss the sufficiency of the evidence, unless there is such an absence of evidence upon some essential matter as to raise a question of law.[42] Where there is evidence tending to support the verdict of the jury, though it may appear weak, and though it may seem to indicate that the law would have been satisfied with a verdict for an offense less in degree, the supreme court cannot review or set aside the verdict.[43]

§ 743. Effect of reversal on appeal by defendant.

The reversal of the judgment and of an order denying a new trial, upon the appeal of the defendant, does not have the effect to arrest the judgment, but remits the defendant to his original position upon his plea of not guilty, and leaves the case as though a trial had never been had; and the court may proceed in any way authorized by the criminal law.[44] There is no merit in a plea of once in jeopardy in such case.[45] This proposition holds good although the reversal is on the ground of an informality in the verdict.[46]

instated after dismissal upon showing of a sufficient excuse for the delay.

41 See chapter 40.

42 People v. Williams, 133 Cal. 165, 65 Pac. 323; People v. Marshall, 112 Cal. 422, 44 Cal. 718; People v. Lowen, 109 Cal. 381, 42 Pac. 32.

43 People v. Sexton, 132 Cal. 37, 64 Pac. 107. But it was held that the rule applicable to conflicting evidence did not prevent the review of the sufficiency of evidence to show a case of embezzlement, where the conflicting evidence was as to facts, which, if taken as proven, did not make out a case of embezzlement: People v. O'Brien, 106 Cal. 104, 39 Pac. 325.

44 People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

45 People v. Hardisson, 61 Cal. 378; People v. March, 6 Cal. 543. Plea of former acquittal proper where reversal on appeal by state of judgment of acquittal: State v. Herron, 12 Mont. 300, 30 Pac. 140.

46 People v. Travers, 73 Cal. 580, 15 Pac. 293.

CHAPTER 46.

APPEALS FROM JUSTICES' COURTS.

§ 744. Scope and limits of jurisdiction.
§ 745. How taken—Effect of appeal.
§ 746. Statement where appeal on question of law alone.
§ 747. Record on appeal—What constitutes—How transmitted.
§ 748. Security to respondent—Effect of failure to provide.
§ 749. Disposal of appeal in superior court.
§ 750. Supervisory power of supreme court.
§ 751. Proceedings subsequent to final order in superior court.

§ 744. Scope and limits of jurisdiction.

The proposition that justices' courts, and other courts inferior to courts of record, are creatures of municipal law, that their powers in entertaining and trying causes, as well as their methods of procedure, are purely statutory, is too fundamental to require elaboration. The same is true with respect to appellate jurisdiction and procedure, upon the exercise of such administrative jurisdiction. The clause of the California constitution which controls herein, is that the superior court "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts, in their respective counties, as may be prescribed by law."[1] This limits the exercise of the jurisdiction of the superior court to the extent and mode prescribed by the legislature.[2] The superior court can acquire appellate jurisdiction of a cause pending in a justice's court only in conformity with the steps prescribed by the statute for taking an appeal from that court, nor can it, after such appeal has been taken, exercise any other jurisdiction in the cause than has been authorized by statute. After its appellate jurisdiction has once been ac-

1 See ante, § 469 et seq.

2 Sherrer v. Superior Court, 94 Cal. 354, 29 Pac. 716.

quired, its action within the limits of that jurisdiction, unless in direct contravention of some positive statute, is entitled to all the presumptions of regularity that attach to the exercise of its original jurisdiction.

Here, as in the case of the appellate jurisdiction of the supreme court, the legislature possesses merely the power to prescribe and regulate the procedure. The jurisdiction itself, as well as its limitations, are derived directly from the constitution. Accordingly, it was held that, under the constitution, and prior to any act of the legislature relating to appeals from justices' courts, the superior court had jurisdiction of such appeals.[3] It will be observed, however, that, by the terms of the constitution, the legislature may prescribe the "cases" in which appeals may be taken. The legislature having provided for appeals from judgments only, none can be taken from orders of justices, whether made before or after judgment.[4]

Each state has its own peculiar statutory scheme for such appeals. That of California is embodied in chapter 3 of title 13 of the Code of Civil Procedure (sections 974 to 980, both inclusive), and goes considerably into details. The plan to be pursued to vest the superior court with appellate jurisdiction in any particular case, is very similar to that of an appeal from the superior to the supreme court.

The powers of the superior court, after jurisdiction has vested, are much more extensive than those of the supreme court on appeal, and are conferred by a section which reads

3 California etc. Co. v. Superior Court, 60 Cal. 305. See Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196, holding that the superior court has original jurisdiction of all questions pertaining to the title or possession of real property, and having jurisdiction of the parties upon the appeal from the justices' court, may properly try an issue as to the possession and right of possession of land.

4 See Wells v. Torrance, 119 Cal. 437, 51 Pac. 626. In this case it was held that an order made by justice's court in proceedings supplementary to execution, requiring the judgment debtor to apply designated property to the satisfaction of the judgment, was not in the nature of a judgment, and is not appealable to the superior court. No jurisdiction in appellate court, if the justice had not jurisdiction: Plunkett v. Evans, 2 S. Dak. 434, 50 N. W. 961.

as follows: "Upon an appeal heard upon a statement of the case, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify, any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary, or proper, order a new trial. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the superior court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the superior court are applicable to trials on appeal in the superior court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from. Judgments rendered in the superior court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the superior court." [5]

Most of the principles stated and illustrated in preceding chapters of this part are there applicable, and therefore a brief discussion of peculiarities will suffice.

§ 745. How taken—Effect of appeal.

An appeal may be taken from a justice's court to the superior court at any time within thirty days after the rendition of the judgment.[6] To effectuate the appeal, three things are necessary, viz.: the filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all of these things must be done within thirty days after the rendition of the judgment.[7] All these are jurisdictional prerequisites. None of them can be dispensed with, nor can any of them, if not done, be supplied, or, if fatally defective, be remedied, after the time limited by statute; for, until all the

5 Cal. Code Civ. Proc., § 980.

6 Cal. Code Civ. Proc., § 974.

7 Cal. Code Civ. Proc., §§ 974, 978.

prerequisites are completed, the appeal is not effectual for any purpose.[8]

The appellant need not wait for entry of judgment by the justice. That is only a ministerial act. An appeal lies from the decision without formal entry.[9] The code provides for the appeal within thirty days after "rendition" of the judgment.[10]

The right of appeal is not affected by the nonappearance of the party at the trial before the justice; and an appeal lies from a default judgment.[11]

An appeal from a justice's court, to the superior court, upon questions of law and fact, upon the giving of a proper stay bond, deprives the former of all jurisdiction over the case, and vacates and sets aside the judgment therein, and the case is thereafter in the superior court, and the rights of the parties are to be determined by the action of that court, which is of general jurisdiction, and all of whose orders are attended with a presumption of regularity.[12]

8 Coker v. Superior Court, 58 Cal. 178; McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845; Dutertre v. Superior Court, 84 Cal. 535, 24 Pac. 284. To same effect, Rudolph v. Herman, 2 S. Dak. 399, 50 N. W. 833. As to contents of notice, see Price v. Van Carneghan, 5 Cal. 125. Notice need not be filed prior to service upon adverse party: Hall v. Superior Court, 71 Cal. 550, 12 Pac. 672. Notice of appeal may be served personally, though adverse party represented before justice by attorney: Pacific Coast Ry. Co. v. Superior Court, 79 Cal. 103, 21 Pac. 609. On same principle, signatures to notice need not designate signers as attorneys for appellant: Rutledge v. Superior Court, 67 Cal. 85, 7 Pac. 144. It is sufficient if it be signed by the appellant personally or any agent for him: Totton v. Superior Court, 72 Cal. 37, 13 Pac. 72. But the service itself must be actual in conformity to the statute. The service of an unsigned copy is insufficient: Houser v. Nolting, 1 S. Dak. 483, 78 N. W. 955. A justice cannot be compelled to forward the papers to the higher court until all his fees are paid: Webster v. Hanna, 102 Cal. 177, 36 Pac. 421.

9 Porter v. Parker, 4 Dak. 397, 33 N. W. 70.

10 Cal. Code Civ. Proc., § 974.

11 Penot v. Owen, 7 S. Dak. 454, 64 N. W. 526; Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481; Rossi v. Superior Court, 114 Cal. 371, 46 Pac. 177.

12 Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193. When an appeal is taken from a judgment rendered by default

§ 746. Statement where appeal on questions of law alone.

The code provides as follows: "When a party appeals to the superior court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be set-

in a justice's court, upon questions of law and fact, the superior court must entertain and decide the appeal as upon questions of law alone: Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481. In this case the court said: "The action first taken by the court upon the appeal was correct. It passed upon the merits of the appeal, and its judgment thereon is final and conclusive, unless set aside within a reasonable time in some mode authorized by law. A petition for a rehearing is a proceeding unknown to the law, or to the practice of the superior court: Code Civ. Proc., § 980. A superior court can set aside its judgment upon an application under section 473 of the Code of Civil Procedure, or on motion for a new trial. Neither of these modes was applicable in the case before us, because the judgment was not taken against the defendants therein through their mistake, inadvertance, surprise, or excusable neglect, and there was no issue of fact tried or to be tried, and no trial within the meaning of section 656 of the Code of Civil Procedure. If the court had refused to determine the question or point of law upon which the appeal was taken, and had attempted arbitrarily to devest itself of jurisdiction by a dismissal of the appeal, its order would have been void: Hall v. Superior Court, 68 Cal. 24, 8 Pac. 509; Carlson v. Superior Court, 70 Cal. 628, 11 Pac. 788; and its order attempting to do indirectly what it could not do directly, is, we think, equally invalid. The order is, in effect, a dismissal of the appeal. It shows upon its face an attempt by the court to devest itself of jurisdiction. The parties were entitled to the judgment of the court upon the merits of the appeal. The court gave them the benefit of its judgment, but subsequently, upon an erroneous conclusion as to its own powers, attempted to set aside its judgment by an order made upon a petition for a rehearing. The order, we think, was coram non judice, and void. Of course we must not be understood as saying that the superior court has not the power to set aside any order or judgment it may have made inadvertently or through mistake; but in all cases the order must be made within a reasonable time: Ex parte Gilmore, 71 Cal. 624, 12 Pac. 800."

tled by the justice or judge; and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the superior court." [13]

The divergencies in the method of preparation of the statement from that to be pursued in the superior court are but slight. The time for preparation cannot, it is thought, be extended. The appellant is not confined to questions of jurisdiction, when relying upon that ground. Upon appeal on a statement properly prepared, he may urge any and all questions, either of law alone, or of law and fact.[14]

§ 747. Record on appeal—What constitutes—How transmitted.

Simplicity characterizes the preparation and transmission of the record an appeal to the superior court. It is seen by reference to the code sections, that the appellant may elect between a review upon questions of law alone, or a trial de novo. No statement is required if a trial de novo, that is, upon both law and fact, be desired. In that case, the entire record of the cause in the justice's court must be sent up to the superior court, and it has jurisdiction to try the cause anew; but where the appeal is upon questions of law alone, the appeal goes up upon a statement of the case, unless the error is shown upon the face of the docket or copies of the papers required to be sent up, and the justice is not required to send up the entire record, and, in such case, the superior court can merely pass upon the questions of law presented, and has no jurisdiction to try and determine the whole cause.[15]

13 Cal. Code Civ. Proc., § 975. Statement of case on appeal must be filed with the justice, else it will not confer jurisdiction upon the appellate court: Tschetter v. Heiser, 9 S. Dak. 285, 68 N. W. 744.

14 See Holbrook v. Superior Court, 106 Cal. 589, 39 Pac. 936.

15 Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379; Cal. Code Civ. Proc., § 976.

§ 748. Security to respondent—Effect of failure to provide.

A pursuance of the same order in filing and serving the notice of appeal, and in filing the undertaking, as in cases appealed from the superior, to the supreme, court, and within proper time, is a sufficient compliance with the statute.[16]

The necessity for, and the process of, justification of sureties excepted to, calls for no discussion different from that already pursued under the hear of appeals to the supreme court.[17]

The rule that the statutory steps must be taken applies as well to the justification of sureties as to any other step in the process of appeal. The code section on that subject contains a provision in the same terms as was contained in the section of the Practice Act prior to the amendment of 1866, governing appeals generally, that, "unless they, or other sureties, justify before a judge of the court below, or the county judge, or the county clerk, within five days thereafter (upon notice to the adverse party), the appeal shall be regarded as if no such undertaking had been given."[18] And the same rule, that a new undertaking cannot be accepted in the higher court in the total absence of compliance, or of a bona fide attempt to comply with the code requirement in the lower court,

16 Hall v. Superior Court, 68 Cal. 24, 8 Pac. 509. A failure to file undertaking in time renders appeal ineffectual and judgment of superior court void: McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354. The superior court can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient undertaking insufficient. The sufficiency or insufficiency of the undertaking can be inquired into, in a proceeding to test the question of jurisdiction: Levy v. Superior Court, 66 Cal. 292, 5 Pac. 353; Brown v. Brown, 12 S. Dak. 380, 81 N. W. 627, holding, also, that absence of bond not waived by going to trial in appellate court without objection. To same effect, Brown v. Railroad Co., 10 S. Dak. 633, 66 Am. St. Rep. 730, 75 N. W. 198; Eipenbach v. Railroad Co., 11 S. Dak. 201, 76 N. W. 923.

17 Chapter 32, § 575. See Bennet v. Superior Court, 113 Cal. 440, 45 Pac. 808; Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200.

18 Laws 1851, p. 108, § 355; Raush v. Van Hagen, 17 Cal. 122; Coker v. Superior Court, 58 Cal. 178; Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200; McCrackin v. Superior Court, 86 Cal. 74, 24 Pac. 845.

also applies.[19] The superior court has no jurisdiction to extend the time for the justification of sureties.[20]

But, under the code section, providing that an appeal from a justice's court "is not effectual for any purpose unless an undertaking be filed," and upon the failure of the sureties to justify within the time allowed by law after an exception to their sufficiency, "the appeal must be regarded as if no undertaking has been given," the failure of the sureties to justify after an exception to their sufficiency does not ipso facto vacate the appeal. That section is merely intended to give respondent the right to move to dismiss the appeal if he shall so choose, and the jurisdiction of the superior court, having attached upon the perfecting of the appeal by the filing of the undertaking, can only be devested by an order of dismissal or some other act of the court.[21]

Upon such appeal, the superior court has power to authorize the appellant to file a new undertaking, in lieu of an undertaking, insufficient in form.[22]

§ 749. Disposal of appeal in superior court.

The powers of the superior court of California on appeals from inferior courts are defined and regulated by the code provision quoted in the first section of this chapter.

Where the title to, or right of possession of, real estate is shown to have been involved, and to have been investigated before the justice, the simple duty of the superior court is to reverse the judgment.[23]

19 See ante, §§ 554, 575; McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354; Levy v. Superior Court, 66 Cal. 292, 5 Pac. 353; Smith v. Coffin, 9 S. Dak. 502, 70 N. W. 636.

20 McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845.

21 Moffatt v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Cal. Code Civ. Proc., § 978. Justification must be upon notice to opposite party: McDonald v. Paris, 9 S. Dak. 310, 68 N. W. 737. Upon exceptions being taken to the undertaking, the sureties or others in their place must justify, else the appeal will be dismissed: Barber v. Johnson, 4 S. Dak. 528, 57 N. W. 225.

22 Gray v. Superior Court, 61 Cal. 337.

23 King v. Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10.

Where the justice has rendered judgment, without a trial of issues of fact, upon a question of law alone—for instance, by a ruling upon a demurrer, and such ruling was erroneous —the superior court should reverse the judgment and remand the case with directions to the justice's court to overrule the demurrer, with leave to the plaintiff to amend, if so advised.[24]

Conformably to the practice in the supreme court, it is proper for the superior court to dispose of objections to jurisdiction before considering the merits.[25]

The superior court has no jurisdiction to try the action upon issues of fact de novo, upon an appeal from a justice's court on questions of law and fact, unless there has been a trial upon the issues of fact as made in the justice's court.[26]

The provision of the section[27] purporting to authorize the transfer of appeals from justices' courts to the superior court of another county, is unconstitutional.[28]

The superior court may adopt rules, not in conflict with the statute, governing the time within which the transcript

24 Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379. Where justice dismisses without trial, without legal reason, superior court should remand with direction for trial on the issues: Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648.

25 Holbrook v. Superior Court, 106 Cal. 589, 39 Pac. 936. Insufficiency in the notice of appeal or in the proof of service thereon is waived by the respondent participating without objection in the trial in the superior court: Matthews v. Superior Court, 70 Cal. 527, 11 Pac. 665. Notice is required of motion to dismiss on appeal from justice, but the other party may take judgment where appellant fails to appear: Myers v. Mitchell, 1 S. Dak. 249, 46 N. W. 245; Keehl v. Schaller, 1 S. Dak. 290, 46 N. W. 934.

26 Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648. See Wimsey v. McAdams, 12 S. Dak. 509, 81 N. W. 884, holding that on appeal from a default judgment in a justice's court, appellant entitled to trial de novo same as if there had been no default. Errors that may have been committed by the justice are not regarded where trial de novo: Yankton (City of) v. Douglass, 8 S. Dak. 441, 66 N. W. 923.

27 Cal. Code Civ. Proc., § 980.

28 Luco v. Superior Court, 71 Cal. 555, 12 Pac. 677; Gross v. Superior Court, 71 Cal. 382, 12 Pac. 264; Cal. Const. 1879, art. 6, § 9.

shall be filed, and may dismiss the appeal for noncompliance therewith.[29]

Petitions for rehearing in the superior court, after decisions on appeals from a justice's court, are unknown to the law, or to the practice. Such decisions can only be set aside upon applications under section 473, or on motion for new trial.[30]

New trials are freely granted in such cases, upon sufficient grounds therefor being shown.[31] The proceedings for a new trial therein are the same as in other cases.[32]

The dismissal of an appeal from the erroneous judgment of a justice, for a technical defect, has the effect to affirm the erroneous judgment, and to put it beyond attack for any error which could have been availed of on appeal.[33]

§ 750. Supervisory power of supreme court.

Except in certain cases where the superior court and justices' courts have concurrent original jurisdiction, no appeal lies from the decision of the superior court on cases brought there on appeal.[34] The supervisory power of the supreme court in such cases is exercised by means of certain original writs; mandamus and certiorari being most frequently resorted to. Thus it was held that mandamus would lie to compel a trial de novo, and to prevent a case being improperly

29 McKay v. Superior Court, 86 Cal. 431, 25 Pac. 10. Mere delay in moving to dismiss not a waiver of the right to a dismissal where the papers on appeal not transmitted from justice's court within the time fixed by statute: Hankland v. Railroad Co., 11 S. Dak. 493; 78 N. W. 958.

30 Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481.

31 See Massman v. Superior Court, 71 Cal. 582, 12 Pac. 685.

32 See White v. Superior Court, 72 Cal. 475, 14 Pac. 87. The retrial must take place in the superior court, that court having no power to remand for new trial in the justice's court: Acker v. Superior Court, 68 Cal. 245, 9 Pac. 109, 10 Pac. 416.

33 Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379.

34 See ante, §§ 469, 473. Such cases are distinguishable from cases transferred to superior court from justice's court. See Southern California Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789.

remanded to the justice's court.[35] It was held, however, in Levy v. Superior Court,[36] that, where the superior court had dismissed an appeal for a supposed insufficiency in the undertaking, the remedy of the appellant was by certiorari to annul the order of dismissal, before proceeding by mandamus to compel the hearing of the appeal. And in another case, it was held that an attempted dismissal of an appeal, taken upon questions of law alone, on the ground that it should have been taken on questions of both law and fact, was in excess of jurisdiction, and the order of dismissal was annulled in a proceeding of certiorari.[37]

§ 751. Proceeding subsequent to final order in superior court. It will be observed that the code makes elaborate provisions for stay of execution, restitution, etc., upon appeal from justices' courts.[38] There is not sufficient difference in substance between those provisions and those discussed in a previous chapter to warrant any additional discussion.[39]

35 Acker v. Superior Court, 68 Cal. 245, 9 Pac. 109, 10 Pac. 416.

36 66 Cal. 292, 5 Pac. 353.

37 Carlson v. Superior Court, 70 Cal. 628, 11 Pac. 788.

38 Cal. Code Civ. Proc., §§ 978, 979.

39 See chapter 31. See, also, Moxson v. Superior Court, 124 Cal. 468, 57 Pac. 379, holding that the superior court, by virtue of its appellate power, has jurisdiction upon reversal of a judgment of the justice's court appealed to it upon questions of law alone, to make its judgment of reversal effectual, by remanding the cause to the justice's court for further proceedings according to its directions, and that it may control and direct the subsequent action of the justice's court; Winton v. Knott, 7 S. Dak. 179, 63 N. W. 783, holding that where action tried de novo on appeal in higher court, judgment may be enforced in the same manner as a judgment in an action commenced therein.

PART IV.

CHAPTER 47.

RELIEF AGAINST JUDGMENTS AND DECREES BY SUIT IN EQUITY.

§ 752. Distinctions and definitions.
§ 753. Mere errors and irregularities no ground for equitable relief.
§ 754. The jurisdiction purely equitable and the suit an indirect attack upon the judgment.
§ 755. Party seeking the relief must show diligence—Herein of laches.
§ 756. When a meritorious cause of action or defense must be shown.
§ 757. Must appear that party seeking relief would be benefited by a re-examination.
§ 758. Must offer to do equity.
§ 759. Rule that no relief granted upon grounds available in original suit.
§ 760. Remedy by motion or otherwise in court, where action tried, as bar.
§ 761. Concurrent remedies by motion and suit in equity further considered.
§ 762. No jurisdiction as to judgments fixing status of persons or property.
§ 763. Fraud as ground for relief.
§ 764. Further as to meaning of extrinsic fraud.
§ 765. Fraud consisting of unauthorized appearance of attorney.
§ 766. Mistake as ground for relief.
§ 767. Accident and surprise as ground for relief.
§ 768. Loss of bill of exceptions.
§ 769. Relief against void judgments.
§ 770. Further as to relief where no jurisdiction of the person.
§ 771. Relief granted for matters occurring after judgment.
§ 772. Bills of review.
§ 773. Parties to the action.
§ 774. Allegations must be specific.

§ 752. Distinctions and definitions.

It is clearly not within the scope of this work to discuss, to any considerable extent, the remedies by which courts will preserve and enforce equitable rights generally. Courts employ the remedy best adapted to meet the necessities of each particular case; whether it be by injunction against the owner of the judgment, a re-examination, in whole or in part, a delivery up and cancellation of writings, or otherwise.

It should be here remarked that, in states where are found liberal provisions for appeal, with or without bills of exception, a bill of review performs no function not performed by the appellate remedy, with reference to errors of record; and as to the form of the bill of review grounded upon new discovery, it now seldom has any features by which to distinguish it from the complaint or petition attacking a judgment at law upon like ground.

It is difficult to understand how bills for relief against decrees in chancery for newly discovered facts ever came to be called bills of review. To enjoin, or destroy the force and effect of a decree by means of extrinsic matter, not passed upon in the action, in which it was recovered, is not to review it.[1]

The equitable jurisdiction over judgments at law has scope and limitations abstractly well defined. If the proper method of discussing this or any other branch of equity, jurisprudence could be restricted; if the courts were not so much inclined to drift into extended speculations or dissertations, dealing in what does, to the exclusion of what does not, warrant relief when a case is presented for decision, and if law-writers were not so much inclined to follow their example, there would be at least a better general understanding of fundamental principles, and, consequently, fewer decisions deserving criticism. There is nothing novel or exceptional in the application of equitable maxims and principles to cases demanding relief from judgments. Each case proper for equitable interference falls naturally into one of the recognized branches; that is to say, under an established head of equitable jurisdiction.

1 See Buffington v. Harvey, 95 U. S. 103.

Anciently, courts of equity exercised jurisdiction to grant new trials in cases of manifest injustice, or when testimony had been newly discovered. The practice went out of use when courts of law became more liberal in granting new trials. In Oliver v. Pray,[2] the supreme court of Ohio, being a court of original equitable jurisdiction ordered a retrial before it of an action in which the complainant had lost his appeal by reason of a misprision of the clerk of a trial court, in which an action was tried. The court avowedly exercised the ancient jurisdiction of chancery courts to direct new trials at law, but practically it followed the modern practice of having the re-examination in the court of equity on the pleadings filed therein.

The court of equity does not, in such a case, professedly sit in review of the proceedings in the law court for the correction of errors, however palpable they may be. Nor is it alone sufficient that the particular judgment against which relief is sought appears to be unjust or inequitable. It must appear, in addition, that there was mistake, accident, fraud, or some other element constituting the matter one of equitable cognizance, unmixed with negligence on the part of the complainant.[3] "Equity will not maintain jurisdiction of a suit of this nature, merely on the ground that the demand may be unconscionable, and that injustice may be done, provided it was competent for the party to have placed the matter before the court in the original action, either upon issues joined or upon motion to set aside the verdict or judgment."[4]

2 1 Ohio 175, 19 Am. Dec. 595, and note. In this case the court refers to the case of Floyd v. Jayne, 6 Johns. Ch. 479, in which Chancellor Kent said: "The present case seems to prove an exception to the modern rule, and to require of this court the exercise of that ancient jurisdiction, because here is a case in which the court of law has no power to award a new trial upon the merits." But for good reasons stated by the learned chancellor, he dismissed the bill. That was in 1822, and the exercise of the jurisdiction by courts of chancery was then said to be ancient. Few subsequent case of its exercise can be found, and yet there are judges and writers still speaking of the granting of new trials by courts of equity.

3 York v. Clopton, 32 Ga. 362; Foster v. Wood, 6 Johns. Ch. 87; Kinney v. Ogden, 2 Green. Ch. 168; Williams v. Lee, 3 Atk. 223.

4 Borland v. Thornton, 12 Cal. 440; Ede v. Hazen, 61 Cal. 360.

Nothing in the jurisprudence of civilized nations is better established than the power of courts of equitable jurisdiction to relieve against judgments at law and decrees in chancery in certain circumstances. And yet, as has been often declared (but not quite so often followed out in practice), it is a jurisdiction which should be cautiously exercised. In almost innumerable cases, the right or intention to disturb or readjudicate what has been passed upon in a legal form has been disclaimed; and perhaps in few, if any, cases have chancellors, avowedly, assumed to place themselves in the seats of the law judges and proceeded to a retrial of the case de novo. But to offer a plaintiff the alternative of having the enforcement of a judgment entered in his favor perpetually enjoined, unless he consents to a re-examination in the court granting the injunction, is sometimes more onerous and hazardous to the right upon which he originally founded his action, and often is more likely to defeat the just rights of the parties than if he could have been, and were, compelled simply to retry the case in the law court. By assuming jurisdiction, and injecting into the case the new matters contained in the bill upon which the new jurisdiction is based, there is an entire modification of all rights as a party litigant, acquired by the commencement of the action, and a complete succession of the court of equity to that of the law court; a complete subordination of the one jurisdiction to the other; a trial of different issues from those originally tendered by the plaintiff in his pleading filed in the orderly course of procedure. The above-mentioned result is accomplished whether the equitable jurisdiction be asserted in the form of an injunction nisi, a bill of review, or the ordinary action to vacate the judgment of the law court.

These far-reaching and unsettling effects were appreciated from the earliest assertion of the equitable jurisdiction, and constituted strong arguments against its exercise. And at the present day an understanding of them constitutes an all sufficient reason for the numerous restrictions and safeguards thrown around, and narrowing conditions imposed upon it.

The main essentials to equitable relief, by independent suit, are as follows: 1. That the petitioner, plaintiff or complainant

has lost, or been deprived of, a cause of action, or a valid and meritorious defense, either in whole or in part; 2. That such loss or deprivation was due to the inadequacy of the powers of the court in which the action was tried, or matter heard and disposed of, to hear and grant the relief, or because of fraud, accident, or other ground cognizable in equity; 3. That there is no adequate remedy available, except the relief which may be afforded by a court of equity.[5] One of the clearest and best presentations of the prime requisites for relief was by Chief Justice Marshall in Marine Ins. Co. v. Hodgson[6] as follows: "Without attempting to draw any precise time to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself, or his agents, will justify an application to a court of chancery."

§ 753. Mere errors and irregularities no ground for equitable relief.

A rule allowing errors to be the basis of successful applications for the exercise of equitable jurisdiction would necessarily lead to a retrial of the whole case in equity; first, of the question of law, to determine if an erroneous decision was given, and, secondly, of the issue of fact, to ascertain if such error affected the result of the trial and was prejudicial. This, it has been long understood, is not the province of equity in

5 Headley v. Bell, 84 Ala. 346, 8 South. 391; Harding v. Hawkins, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; York v. York, 3 N. Dak. 343, 55 N. W. 1095. "There seems to be no conflict in the authorities as to the principles upon which courts of equity interfere to grant relief against judgments recovered at law. It must appear that the party could not avail himself of his defense in the action at law, or that he was prevented from doing so by fraud, accident or mistake, without fault or negligence on his part": Quinn v. Wetherbee, 41 Cal. 250, per Temple, J.

6 7 Cranch, 336.

such cases. This rule is applicable to every class of errors occurring during the trial.[7] Nor is this rule altered by the fact that the error committed on the former trial is manifest, upon an inspection of the record.[8]

Even if it is apparent that the judgment is excessive, this rule is not relaxed.[9] And the fact that the judgment was by

7 Estate of Griffith, 84 Cal. 107, 112, 23 Pac. 528, 24 Pac. 381; Collins v. Butler, 14 Cal. 226; Moore v. Dial, 3 Stew. 155; Williams v. Carr, 4 Colo. App. 368, 36 Pac. 646; Galena etc. Co. v. Ennor, 116 Ill. 55, 4 N. E. 762; Vaughan v. Johnson, 9 N. J. Eq. 173; Greenfield v. Pierson, 7 Heisk. 633; Harrison v. Nettleship, 2 Mylne & K. 423. In Collins v. Butler, supra, the court said: "The bill is filed to enjoin this judgment on several grounds: The first is for matter entitling the defendant to a new trial. But this matter is the same as that relied on below, and held insufficient. We do not think that it can seriously be contended that chancery will give relief, by way of appeal from the law side of the district court, much less from the judgment of this court, upon the same facts passed upon in judgment by the law court and this court. The district judge, sitting on the trial below, had full power to act in the premises; and this matter, if sufficient at all, was matter for relief at law. There can in such a case be as little necessity as authority for the interposition of a court of equity. Litigation would be unnecessarily protracted, if, in every case in which a party moved for a new trial and failed, he could then, upon the same facts apply to the same judge for an injunction, and retry his case in equity; and there would be a singular inconsistency in holding that the same judge, with full jurisdiction and capacity to pass upon given facts and grant the appropriate relief, should apply one measure of relief, or one set of rules, in one character, and another and different measure or set in another character." In Murdock v. De Vries, 37 Cal. 527, 529, the court said: "If the judgment in question is to be considered as merely erroneous, the plaintiff has now no remedy, for he has allowed the time for appeal to pass without taking any steps to obtain a reversal. If it is to be considered as absolutely void upon its face, so far as it grants personal relief, the plaintiff still has a remedy by motion to quash the execution and to stay the judgment in the court in which it was rendered. Upon the question whether the judgment, so far as it grants personal relief, is void, or merely erroneous, we reserve our opinion until it is presented in a different manner. To consider it now would be to go beyond the exigencies of the present case."

8 De Haven v. Cevalt, 83 Ind. 344; Landry v. Bertrand, 48 La. Ann. 48, 19 South. 126; Neville v. Pope, 95 N. C. 346.

9 King v. Vaughan, 8 Yerg. 59, 29 Am. Dec. 104; Rogers v. Stokes, 87 Tenn. 294, 11 S. W. 215.

default is not material within the rule now under consideration. Thus, where a plaintiff, the defendant not appearing, had asked of the court, and the court had awarded, judgment for an amount in excess of what the complaint entitled him to, and the defendant had brought suit in equity to enjoin the collection of the excess, the court, in reversing a decision of the lower court granting the relief, said: "We do not understand that a party who asks for more relief at the hands of the court than he is entitled to, thereby attempts a fraud upon the opposite party, or consummates a fraud if he gets it. Of such a transaction nothing more can be predicated than that the plaintiff has obtained an erroneous judgment, which will be reversed or modified on appeal, or possibly one which is, pro tanto, absolutely void. Such a transaction discloses none of the grounds upon which a court of equity will interpose and stay the judgment. If erroneous, the defendant has a remedy by appeal; if void upon its face, he has, in addition, a remedy by motion, at any time, in the court by which the judgment was rendered." [10] In Merrill v. First Nat. Bank,[11] the plaintiff who had become surety on a note of one Hubbell, to the defendant, had allowed judgment to go against himself, in ignorance of the fact that his principal had paid the note. It was held that upon his action in equity he was entitled to a decree directing satisfaction of the judgment. It is difficult to see anything more in the case than a concealment by the creditor of the fact of payment; and yet it might be considered a legal fraud, whether with or without a fraudulent intent. Very slight diligence was shown by the applicant. And yet, upon the whole, it would be strange if, in such a case, a court of conscience could grant no relief. For the purposes

10 Murdock v. De Vries, 37 Cal. 527; Reeve v. Kennedy, 43 Cal. 643. See, also, Chipman v. Bowman, 14 Cal. 157; Logan v. Hillegas, 16 Cal. 200; Bell v. Thompson, 19 Cal. 706; Sanchez v. Carriga, 31 Cal. 170.

11 94 Cal. 59, 29 Pac. 242. See, also, Wales v. Bank of Michigan, Harr. (Mich.) 308; Reed v. Harvey, 23 Ark. 44; Cox v. Mobile etc. Ry. Co., 44 Ala. 611; Chicago etc. Ry. Co. v. Hay, 119 Ill. 493, 10 N. E. 29; Mellick v. Torna C. B. Co., 52 Iowa, 94, 2 N. W. 1021; Cairo etc. Ry. Co. v. Titus, 28 N. J. Eq. 269; Hoit v. Batts, 17 S. C. 35; George v. Strange, 10 Gratt, 499; Ferrell v. Allen, 5 W. Va. 43.

of the relief, it was considered sufficient that the want of knowledge of the existence of his defense on the part of the defendant was not inconsistent with reasonable diligence. The exception to the general rule in this and similar cases may be accounted for upon the theory that the plea of payment is much favored in equity. And there are numerous decisions sanctioning relief by courts of equitable jurisdiction, in favor of defendants in actions at law, who either were ignorant of the fact of payment, or were without satisfactory evidence of it, at the trial, and were without negligence, and afterward found a receipt, release, or other irrefutable proof of payment.[12] So in Reeve v. Kennedy,[13] the application was, not for direct relief against the judgment, which was by default, but against the purchaser at a tax sale, under a judgment for taxes, claimed to be void because the personal property tax of the owner of the land and applicant for the equitable remedy was added to the taxes assessed against the land. The prayer was for a cancellation of the deed to the purchaser. The principle applicable was the same as if an injunction or other relief had been asked against the judgment. The court, affirming the judgment of dismissal of the lower court, said: "But the judgment is also assailed on the grounds that it orders the land to be sold, not only for the tax which was specifically assessed upon it and the improvements, but also for the personal property tax assessed to Dinnicke, and which could not become a lien on the land until after the judgment was docketed, which was long after the plaintiff purchased. This was unquestionably an error for which the judgment might have been reversed on appeal; but it does not affect the validity of the judgment and render it wholly void. It was only an error of the court in determining the amount of the specific lien on the land, and a judgment is not void because it is for a larger amount than the proofs justify, nor is an execution void because it is for a larger amount than the judgment authorized."

12 See Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Brown v. Leuhrs, 79 Ill. 575; Ahl v. Ahl, 71 Md. 555, 18 A. 959; Foster v. Wood, 6 Johns. Ch. 90; Duncan v. Lyon, 3 Johns. Ch. 356; 8 Am. Dec. 573; Harvey v. Seashol, 4 W. Va. 115.

13 43 Cal. 643, 653.

Where relief was sought in equity against a decree awarding a homestead on the ground that the court had erroneously decided certain property to be community property, the court answered that "These, however, are insufficient grounds for maintaining the present action, as a court of equity will never set aside a judgment for mere error, whether of law or fact, committed in the rendition of the judgment." [14]

Mere irregularity in the proceedings of the legal forum must, in order to entitle the defendant to relief in equity, be of so serious a character as to deprive the court of jurisdiction.[15] Many instances of irregularities presented to courts of equity, as grounds for relief against judgment, could be given. Relief will not be granted for any defects of form in the summons when not wholly insufficient.[16] It was held that a misnomer of the defendant afforded no ground for the relief.[17] But it is obvious that, unless the appearance of the defendant were entered, the use of a name materially different from that of the defendant would be evidence of a lack of jurisdiction. It was held that the failure to appoint a guardian ad litem for an infant was an irregularity which could not be availed of in equity against the judgment.[18] Here too, the decision must be different when there is also a lack of jurisdiction. And in another case it was held that defects in a warrant of attorney, upon which a judgment by confession was based,

14 Wickersham v. Comerford, 104 Cal. 494, 497, 38 Pac. 101. To same effect; Sanders v. Albritton, 37 Ala. 716; Ex parte Christian, 23 Ark. 641; Center Twp. v. Marion Co., 110 Ind. 579; Meixell v. Kirkpatrick, 28 Kan. 315; Drake v. Henshaw, 47 Iowa, 291; Reynolds v. Horine, 13 B. Min. 234; Methodist Church v. Mayor etc., 6 Gill. 391, 48 Am. Dec. 540; Yarborough v. Thompson, 3 Smedes & M. 291, 41 Am. Dec. 626; Donovan v. Finn Hopk. Ch. 59, 14 Am. Dec. 531; McIndoe v. Hazleton, 19 Wis. 567, 88 Am. Dec. 701; Ludlow v. Ramsey, 11 Wall. 581; Tarver v. Tarver, 9 Pet. (U. S.) 174.

15 See Adams v. White, 23 Fla. 352, 2 South. 774; Stiles v. Knapp, 2 Ga. Dec. 36; Blanck v. Speckman, 23 La. 146; Boyd v. Chesapeake, 17 Md. 195, 79 Am. Dec. 646; McIndoe v. Hazleton, 19 Wis. 567, 88 Am. Dec. 701.

16 Waldrom v. Waldrom, 76 Ala. 285; Luco v. Brown, 73 Cal. 3, 2 Am. St. Rep. 772, 14 Pac. 366; Pico v. Sunol, 6 Cal. 294.

17 Genables v. West, 23 S. C. 154.

18 Drake v. Henshaw, 47 Iowa, 291.

were of no avail as a ground for equitable relief.[19] Nor will the insufficiency of findings avail a party in this form.[20] And, in White v. Crow,[21] it was held that the premature entry of judgment could not be made available as the basis for equitable relief. In Tacoma etc. Co. v. Wolff,[22] it was held that the form in which the decree in a suit in equity was entered, in that case as a judgment at law, was no ground for equitable relief. In this case, Hoyt, J., delivering the opinion said: "All courts hold, and we have frequently done so, that it is not enough to entitle a party to have a judgment against him vacated that he should show that it had been irregularly entered; he must in addition thereto, establish to the satisfaction of the court the fact that such judgment is inequitable as against him. Proceedings of this kind are of an equitable nature; and courts will not interfere with the judgment simply because it may have been erroneously entered, unless, in addition thereto, it is made to appear that it is unjustly burdensome to the moving party. In such a proceeding pure technicalities can have little influence upon the decision of the court, if the judgment sought to be vacated is not of such a nature that, if it were set aside, the moving party would be able to interpose a substantial defense upon a new trial, or in another proceeding involving the same cause of action."

§ 754. The jurisdiction purely equitable, and the suit an indirect attack upon the judgment.

Notwithstanding that many decisions are found which it would be impossible to reconcile with the salutary and long settled limitations upon the jurisdiction, still, it must be borne in mind that a great majority of the cases are rational and just illustrations thereof and within proper limits. Some of the erratic decisions are due, no doubt to excessive solicitude lest unjust results be reached in cases of peculiar hardship, and others are due to extremely liberal views of particular judges.

19 Burch v. West, 134 Ill. 258, 25 N. E. 658.

20 Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131.

21 110 U. S. 183, 4 Sup. Ct. Rep. 71.

22 7 Wash. 478, 35 Pac. 115, 755.

With respect to the cause of justice it will be best promoted by adhering to established maxims and principles. Any case going beyond, if followed as a precedent, would tend to unsettle the rights of parties to finished litigation, and endanger titles acquired thereunder. Moreover each relaxation of the binding force of judgments tends more to promote, than to prevent perjury and sharp practice. For the purpose of the correct administration of justice, and in order to preserve the autonomy and integrity of any judicial system, a constant recurrence to the clear expositions of fundamental principles by the jurists of all ages is necessary.

When an action is brought in equity to set aside a judgment at law the attack, although not collateral, is always indirect. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that, in such a case, the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it.

It will be seen that the burden is on the plaintiff, in such action, to excuse himself for not defending, where the judgment shows that he was in default for not doing so. By such an attack upon a judgment, the plaintiff does not question or dispute its effect as an adjudication, but he seeks to be relieved from its operation, upon equitable grounds.[23]

§ 755. Party seeking the relief must show diligence—Herein of laches.

In nearly every well-considered case, in which equitable relief was granted, stress has been laid upon the fact that the plaintiff's failure to obtain justice at law was without fault on his part. By this is understood, not that he shall be abso-

23 In Sanford v. Head, 5 Cal. 297, 299, which was a case of a judgment being obtained by fraud and collusion, the court said: "The bill in this cause alleges a state of facts which, if true, might forever prevent a party from obtaining his just rights in any other manner than by the interposition of a court of chancery."

lutely exempt from every imputation of fault, but of such want of care, diligence and prudence as is requisite in the ordinary business of life.[24] And where it is made to appear, either in the bill or at the trial, that the party seeking the equitable remedy is seeking to have restored to him merely that which, but for his own neglect or inattention, he need not have lost, the relief will be denied. Thus in Markley v. Rand,[25] the court said: "There was a full opportunity to contest every fact while the trial was going on, or before the court lost jurisdiction of the case; and the plaintiff cannot retry the case by bill in equity. If this were so, in every case where by the neglect of the party, or his attorney, a judgment was rendered against him, the case could be taken from the court of law, into a court of chancery."

A party may be guilty of laches in failing to actually acquire knowledge which was as fully within his reach as within reach of the other party. In such case, the possession of the knowledge will be imputed to him by the court of equity to which he may apply for relief against a judgment, alleged to have been unjustly recovered against him, by reason of his want of such knowledge, no fraud or deception having been practiced upon him by the opposite party.[26]

With reference to mere laches, short of the statute of limitations, the courts are usually governed by the particular circumstances. In the case of a judgment against a corporation, recovered by reason of the fraudulent acquiescence or collu-

24 Burton v. Wiley, 26 Vt. 432; Taylor v. Fore, 42 Tex. 256; Corrington v. Holobird, 17 Conn. 530; S. C., 19 Conn. 84; Story's Equity, § 1574. See Quinn v. Wetherbee, 41 Cal. 247, 251, where Justice Temple delivering the opinion said: "I think it clear, however, that one is bound to exercise at least ordinary care and diligence in the management of his defense to the action brought against him."

25 12 Cal. 276, 278.

26 Champion v. Woods, 79 Cal. 17, 20, 21 Pac. 534. In this case it was said: "Judgments may be attacked on the ground of fraud and misrepresentation, it is true, but relief will not be granted unless the party seeking the same has been free from negligence. If the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom."

sion of its directors, interested adversely to it in the action wherein the judgment was recovered, the court said: "The mere lapse of time less than the statutory period of limitation will not bar an action for equitable relief, unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. The bar of an equitable remedy in such cases is not imposed upon the plaintiff as a penalty for his negligence, but is intended merely to protect the defendant from such consequences of the delay as may be prejudicial to his rights."[27] And while a party may sometimes obtain relief in equity where he has been misled by promises of the adverse party made in bad faith, yet it was held that the reliance of the plaintiff in the injunction suit, as defendant in the justice's court, upon the promise of the justice to grant a new trial, which the plaintiff in the justice's court did not appear to have participated in or known, and the postponement of the hearing of the motion until after the expiration of the time for appeal, and the final denial thereof by the justice, could not excuse the neglect of the defendant to appeal from the judgment, or entitle him to relief in equity against the judgment.[28]

§ 756. When a meritorious cause of action or defense must be shown.

Since it is the province of courts of equity, in exercising this jurisdiction, to administer relief only to parties who have been deprived at law of that to which they were equitably, as well as legally, entitled, it follows that a party seeking it must,

27 Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 632, 32 Pac. 600. See, also, Steen v. March, 132 Cal. 616, 64 Pac. 994; New Sombrero Phosphate Co. v. Erlanger, L. R. 3 App. Cas. 1230; Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221. Proceeding in equity to set aside proceedings without jurisdiction, resulting in judgment and sale of their land, commenced ten months after the sale, knowledge of the facts having come to their knowledge after the sale, held commenced in time: Keeley v. East Side Imp. Co. (Colo. App.), 65 Pac. 456. A case similar in important respects and in which a similar result was reached in Ex Mission L. & W. Co. v. Flash, was that of Lang Syne M. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358.

28 Hollenbeck v. McCoy, 127 Cal. 21, 59 Pac. 201.

in order to obtain the interposition of equity, show that he had a meritorious cause of action, or defense in the first instance. Such is the general rule, there being an exception to be noticed presently.

Aside from any features of the case which would form a proper basis for equitable interference, such, for instance, as fraud practiced upon the jurisdiction, a showing must be made that the cause of action or defense of which the party has been deprived was meritorious; for unless he has suffered injustice, or can show either that the judgment itself is unjust and inequitable, or that under the circumstances it would be against conscience to enforce it, it would clearly be inequitable to interfere.[29]

A meritorious defense, as viewed in the decisions, does not necessarily mean one which meets with moral approval, but merely means a substantial, valid defense. Usually, but by no means universally, the defense of the statute of limitations will suffice.[30]

There are cases, however, where the reason for imposing this condition is not present, and, when, as a consequence, the showing of any defense whatever, will be excused. Where judgment has been fraudulently taken against a party, in his absence from the trial, without notice, and where taken without service of original process upon him, he will be entitled, upon tender of the amount due, to enjoin the enforcement of the judgment for any excess, and probably for all costs accruing, subsequently to the date of such fraud, or where he was entitled to be served. And if his property has been sold under

29 Harding v. Hawkins, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; Rupert v. Martz, 116 Ind. 72, 18 N. E. 381; Hollinger v. Reeme, 138 Ind. 363, 46 Am. St. Rep. 402, 36 N. E. 1114; Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 63 N. W. 854; White v. Crow, 110 U. S. 183, 1 Sup. Ct. Rep. 71. Complaint seeking to restrain the enforcement of a judgment for the possession of personalty is insufficient if it fails to aver that the complainant was entitled to its possession, or that the judgment was not attributable to his own neglect: Meinert v. Harder, 39 Or. 609, 65 Pac. 1056.

30 See Gerrish v. Seaton, 73 Iowa, 15, 34 N. W. 485.

a judgment or decree so obtained, he will be entitled, not only to an injunction, but to have the sale set aside, upon tendering the amount due even though he have no defense to the original action.[31] In White v. Espey,[32] an injunction had been granted by the court below against a sale of real estate under a justice's judgment, the entry of which in the clerk's office, made for the purpose of securing a lien on the execution of defendant's land, failing to show that the justice had jurisdiction. In offering the decree the supreme court said: "Counsel for appellant insists that some circumstances must be alleged tending to show that it would be inequitable to enforce said judgment. If this were a case where the sole purpose of the plaintiff in coming into a court of equity to be relieved from a judgment, the defendants' contention would be correct. . . . . But in this case the real purpose of the plaintiffs in invoking the interposition of equity is to prevent a cloud being cast upon the title to their real property. This jurisdiction is constantly assumed and exercised by courts of equity in a very great variety of cases, and is in no way dependent upon other sources of equity jurisdiction referred to." In Martin v. Parsons,[33] the question brought to the supreme court for review was the striking out of a cross-complaint

31 Martin v. Paisons, 49 Cal. 94; Great etc. Min. Co. v. Woodmas etc. Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; Litchfield's Appeal, 28 Conn. 127, 73 Am. Dec. 662. The opinion in the first case here cited contains much valuable information upon the subject of what constitutes a sufficient complaint for the relief; also explains the circumstances warranting relief as against a bona fide purchaser.

32 21 Or. 328, 332, 28 Pac. 71. See, also, Galbraith v. Barnard, 21 Or. 67, 26 Pac. 1110.

33 49 Cal. 94, 100. See, also, McMillan v. Reynolds, 11 Cal. 372; Dobson v. Pierce, 12 N. Y. 164, 62 Am. Dec. 152, and note; Bridgeport Bank v. Eldridge, 28 Conn. 556, 73 Am. Dec. 688. Where property of a defendant was sold under a judgment obtained without service of summons, or their knowledge or appearance in the action, it was held in an action for relief in equity, they need not allege or show a defense to the original action, since, if they had no defense to the claim, they at any rate had had the right to pay and prevent the sale, or to redeem: Keeley v. East Side Imp. Co. (Colo. App.), 65 Pac. 456.

by the judge of the lower court. The court having both legal and equitable jurisdiction, the question was the same as if the cross-complaint had been an original complaint, presented to a court of equity. The action was by the plaintiff, who had bought certain real estate at a tax sale, against the defendant, to quiet title. The plaintiff (purchaser at the tax sale), being a court commissioner at the date when, according to law, such purchaser would have been entitled to the sheriff's deed, had the proceedings been regular and in good faith, had himself prepared the decree which the court signed, reciting therein due and regular service of process upon the owner of the property, which recital was absolutely false. In deciding the case, directing a new trial and reversing the order striking out the cross-complaint, the court said: "Whether the false recitals were inserted in the decree through fraud, or merely from the negligence or mistake of the plaintiff, is immaterial. It was through his fault that the decree was obtained without a service of process, and it would be against good conscience to allow him to profit by his own wrong. In such a case it is not necessary to vacate the judgment, but only to restrain the plaintiff from setting it up as an estoppel, to perpetuate the wrong resulting from his own misconduct. This is a familiar ground for the interposition of a court of equity. While it may be true that a court of equity will not vacate the judgment under such circumstances, it is clear that it will interfere to prevent the use of it as an instrument of justice by the author of the wrong."

There may be authorities to the effect that in all cases of judgments against parties not served with process the court of equity should declare the judgment vacated without a showing of merit; but while that might more completely meet the views of intuitive justice, there are doubts, in the first place, of there being any necessity for so doing in order to meet the demands of substantial justice, and, in the second place, it is contrary to the well-defined province of courts of equity to set aside, even a voidable judgment, under such circumstances. The applicant for relief should not, however, be required to tender more than the debt and interest, together with costs accruing prior to the entry of judgment.

In some of the cases, it is held that, where a judgment has been rendered upon a false return, the defendant, though without a valid defense, is entitled, upon making tender of the full amount due and costs, to more extensive relief than an injunction to prevent the enforcement of the judgment, and to have a sale to a bona fide purchaser, not fully consummated, set aside. Thus it was held in Hausworth v. Sullivan,[34] or at least the language of the court imports as much, that the court exercising equitable jurisdiction should, in such case, formally decree the setting aside of the judgment at law, and award a new trial. But in that case it was admitted that the defendant in the former action and applicant for relief had no defense, and the relief was granted solely on the ground that he had tendered, and stood ready to pay the full amount due, together with costs. If the tender was made, and required to be made, as a condition, why order the judgment vacated? Of what avail was a new trial? It was held in McEacham v. Brackett,[35] that the rule requiring a meritorious defense to be shown had no application, where the court had no jurisdiction of the person of the defendant, as, in that case, where one without authority appeared for him, especially if he offered to pay the full amount justly due from him to the judgment plaintiff, together with interest and costs, merely asking that his property which had been taken from him without due process of law, be returned to him, discharged of the lien of the judgment. But the court remarked: "Were it not that the statute of limitations would not bar a suit for foreclosure, equity would not demand a tender in order to procure the avoidance of the judgment; the court would simply clear its record of that which had been entered there without jurisdiction, although formally regular."

§ 757. Must appear that party seeking relief would be benefited by a re-examination.

This rule has but little relevancy to the subject at the present day. It was important, however, during the ancient period, in which new trials at law were directed by the chan-

34 6 Mont. 203, 9 Pac. 798.

35 8 Wash. 652, 36 Pac. 690.

cellors. It is still a general rule, however, that the party must show that the judgment against him was wrong, or that he is entitled to other or greater relief than that afforded by the judgment against which he seeks relief.[36] The same idea was expressed anciently, when courts of equity granted new trials, by the expression incorrectly used in Davis v. Chalfant,[37] in these words: "In this class of cases it should be made to appear with reasonable certainty, at least, that a new trial would result in a judgment more favorable to the party asking it than the judgment sought to be set aside."

§ 758. Must offer to do equity.

The maxim that "He who seeks equity must do equity" is peculiarly applicable to cases where relief is sought from judgments. The object of such actions is the wresting from a successful litigant a legal advantage, and this will not be permitted without requiring the party seeking the aid of the court

36 Painter v. Painter (J. B.) Co., 133 Cal. 129, 65 Pac. 311. In this case the court said: "The sole grounds on which plaintiff's claim for a new trial is based are, insufficiency of the evidence to justify the findng as to a large part of the amount found to be due, and material errors of law occurring at the trial, and the additional fact that 'the court (presumably the court in which the receivership was pending) declined to permit the receiver to . . . . appeal,' and that the receiver, in fact, did not appeal. Of course, courts of equity have jurisdiction in proper cases (which are not very numerous) to set aside judgments rendered in other actions, and to grant new trials thereof; but we do not know of any principle or precedent on which the present action could be maintained. No fraud on the part of The J. B. Painter Company or the receiver, or collusion between them, is charged. The plaintiff herein was a party to that action, and if he was interested in preventing a judgment against the receiver, he had ample opportunity to defend against such judgment. If he had himself dismissed from the action, and relied upon the receiver making a proper defense, he must abide the result. Moreover, he alleges no facts showing that the judgment was wrong, or that the result would be different upon another trial; and, as was said in Davis v. Chalfant, 81 Cal. 630, 'in this class of cases it should be made to appear with reasonable certainty, at least, that a new trial would result in a judgment more favorable to the party asking it than the judgment sought to be set aside.' For these reasons, and many others which could be given, the demurrer was properly sustained."

37 81 Cal. 627, 22 Pac. 972.

for this purpose to do all that, according to the strict principles of justice and equity, he should do. If this be the payment of a sum of money, the delivery of property, or writings, or the doing of any other act, the complainant must stand ready to obey any order of the court, touching of the same; and generally an allegation of his willingness to do equity, as just stated should be found in the bill.[38] Accordingly, under a statute providing that no injunction shall be granted to stay judgment at law, for a greater sum than the complainant shall show himself equitably not bound to pay, it was held that a complainant was not entitled to an injunction to stay a judgment for wages, obtained before a justice, on the ground that the justice had no jurisdiction, where the complainant acknowledged that he owed a part of the wages, but made no tender of payment.[39]

§ 759. Rule that no relief granted upon grounds available in original action.

The rule that relief will not be granted on account of grievances as to which the party could have obtained relief, or of wrongs which he could have prevented by proper attention and timely objection, motion or proceeding in the original action, is merely a branch of the doctrine that the existence or negligent loss of a legal remedy is a bar to interference by a court of equity.

That a party may deprive himself of any claim to relief in equity by failing to avail himself of opportunities afforded in the court where the judgment against which relief is sought was rendered, is well settled. If, during such trial, or proceeding, h finds himself unable to present a cause of action or defense, or placed at a disadvantage in its presentation, by reason of any fraud, accident, mistake, or misfortune, he should apply to the court, by proper motion or otherwise, for any relief, within the power of the court to grant; and his failure to do so will usually prove fatal to a subsequent application by

38 Creed v. Scruggs, 1 Heisk. 590; Barragree v. Cronkhite, 33 Ind. 192; Yonge v. Shepperd, 44 Ala. 315; Flickinger v. Hull, 5 Gill, 60; Hill v. Harris, 42 Ga. 412.

39 Brewer v. Mack, 14 Colo. App. 454, 60 Pac. 578.

independent action in equity.[40] In Ede v. Hazen,[41] the court said: "As appears upon the face of their complaint, the plaintiff's discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside, and if it be conceded that upon those facts they are entitled to the relief they now claim, it is clear that they had a speedy, complete, adequate, summary remedy in the same proceeding and that the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action." So where, in an action on a contract, it appeared that the plaintiff's interest had been assigned to another pendente lite, and defendant made no objection to such assignment in that action, it was held that he could not subsequently object thereto, in a proceeding brought by him to restrain the enforcement of the judgment recovered.[42]

For the purposes of the rule that mere errors occurring in the legal action will not warrant interference by the court of equity, the nature and extent of such errors is immaterial; and unless facts be shown, which bring the case under some established head of equitable jurisdiction, relief must be denied. Thus, it was held that a judgment should not be enjoined merely because the cause of action upon which it was based was one the enforcement of which was forbidden by statute.[43]

40 Markley v. Rand, 12 Cal. 276; Riddle v. Baker, 13 Cal. 296, 304; Dutil v. Pacheco, 21 Cal. 438, 442, 82 Am. Dec. 749; Allen v. Currey, 41 Cal. 318, 322; Champion v. Woods, 79 Cal. 17, 21, 12 Am. St. Rep. 126, 21 Pac. 534; In re Griffith, 84 Cal. 107, 112, 23 Pac. 528, 24 Pac. 381; Eldred v. White, 102 Cal. 600, 604, 36 Pac. 944; Johnson v. Reed, 125 Cal. 74, 57 Pac. 680; Hollenbeak v. McCoy, 127 Cal. 21, 59 Pac. 201; Waldron v. Waldron, 76 Ala. 285; Wingfield v. McClure, 48 Ark. 510; Morris v. Morris, 76 Ga. 733; Hintrager v. Sumbargo, 54 Iowa, 607, 7 N. W. 92; Flanneken v. Wright, 67 Miss. 217, 1 South. 157; Reagan v. Fitzgerald, 75 N. Y. 230; Syme v. Trice, 96 N. C. 243, 1 S. E. 480; Galveston etc. Ry. v. Wave, 74 Tex. 47, 11 S. W. 918; McIndoe v. Hazleton, 19 Wis. 567, 88 Am. Dec. 701.

41 61 Cal. 360. Citing Ketchum v. Crippen, 37 Cal. 223.

42 O'Rourke v. Schultz, 23 Mont. 285, 58 Pac. 712.

43 National Fertilizer Co. v. Hinson, 103 Ala. 532, 15 South. 844.

The same ruling was made when the court had based its decision on a statute which the supreme court subsequently held unconstitutional.[44]

It is a question still unsettled within some jurisdictions, and settled differently in others, whether a defendant, having an equitable defense to an action at law, which might be made available as such in that action, may yet withhold it and make it the subject of a separate action in equity, for relief against any judgment which may be recovered in the action at law. In most of the states, however, it seems to be settled that a defendant so circumstanced is at liberty to elect between bringing forward his equities in the legal action, and withholding them and applying independently for equitable relief.[45] But, to entitle the party to the benefit of an independent equitable remedy, he must make his election accordingly, and without attempting to make the facts giving rise to his equities available in the action at law; for, if he pursues the latter course, it behooves him to present it fully and effectually. A judgment in the legal action where the equitable matters have been offered for the consideration of the court, by a proper pleading, is conclusive, and is a bar to any relief by separate suit in equity, against the same judgment, unless the party can show that by reason of fraud, accident, mistake, or some other cause, it-

44 Cassell v. Scott, 17 Ind. 514; New Orleans v. De La Cuesta, 10 La Ann. 724.

45 Hough v. Waters, 30 Cal. 310; Golson v. Dunlap, 73 Cal. 165, 14 Pac. 570; Lorraine v. Long, 6 Cal. 452; Hills v. Sherwood, 48 Cal. 386; Morrison v. Hart, 2 Bibb. (Ky.), 4, 4 Am. Dec. 663; Dorsey v. Reese, 14 B. Mon. 157; Hill v. Cooper, 6 Or. 181; Spauer v. McBee, 19 Or. 76, 23 Pac. 818. In Golson v. Dunlap, supra, the court said: "Finally it is contended that the decree of distribution to Susan Dunlap operates as an estoppel against the plaintiffs. But if we assume in favor of the respondents that this question of setting aside the deed for fraud could have been presented and considered upon the application for distribution, it nevertheless was not so presented or considered. And the rule is, that a party having an equitable defense may let judgment go at law and proceed in equity: Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 310." In Hill v. Sherwood, supra, the court said: "The general rule is that the jurisdiction in equity is limited to cases where there is no remedy at law, or none that is plain, adequate, and complete. The

self of equitable cognizance, he was prevented from making such defense effective.[46]

As to what constitutes a presentation of an equitable defense, barring a subsequent resort to a suit in equity, no settled rule can be stated; but it seems that, in order to constitute a bar, it must be persistently brought forward, and submitted for decision, and not withdrawn expressly or by conduct. Where, in an action of ejectment, the defendant set up an equitable defense in his answer, but failed to appear at the trial, it was held that, by his failure to appear, the equitable defense should be considered as virtually dismissed, without being presented to, or considered by the court in rendering judgment in the case; and consequently that there was no bar to a subsequent application for equitable relief, founded upon an equitable title.[47]

Any defenses, other than those which the applicant was at liberty to either present or reserve as ground for a subsequent suit in equity, must be fully presented in the action at law, unless there was a failure to acquire jurisdiction of the defendant, or some other cause sufficient of itself to confer equitable jurisdiction to prevent his availing himself of such defense. Without such showing, except in cases where something has occurred after judgment to render its further enforcement inequitable, the party will not be entitled to relief by separate suit in equity.[48]

application here is made in a case where the jurisdiction is, to some extent, concurrent, but where the peculiar remedy sought cannot be administered in a court of law. The defendants in ejectment would perhaps have been able to maintain their possession, on the ground that the deeds of the testator and of Sarah R. Clark were void as against creditors; but they could not have obtained a decree annulling the deeds as against the creditors, except upon the allegations of a cross-complaint praying affirmative relief. 'Before the case can be considered beyond the reach of a court of equity, it must be made to appear that the legal remedy would be adequate and complete': Hager v. Schindler, 29 Cal. 55."

46 Paynell v. Hahn, 61 Cal. 131; St. Louis v. Schurlenberg, 98 Mo. 613, 12 S. W. 248; Winpeny v. Winpeny, 92 Pa. St. 440; Rees v. Vickers, 27 W. Va. 456; Hendrickson v. Huckley, 17 How (U. S.) 443.

47 McCreary v. Casey, 45 Cal. 128.

48 Ludeling v. Chaffee, 40 La. Ann. 645, 4 South. 586; Postle-

It is not necessary for the applicant to show any of the extraneous conditions, such as fraud, accident, mistake, and the like, by way of excuse or explanation for not having made his defense or for not having presented a cross-complaint in the court where the action was tried, if the ground of the defense or cross-complaint itself consists of matters of equitable cognizance, which the court of law had no power to hear and give effect to. He may in such case make direct application to the court of equity for such relief upon such matters as the same warrant.[49] The proposition last stated would not hold good as to any mere equitable defense, in California and other states where equitable jurisdiction and jurisdiction at law are blended in the same court, and provision made by statute for a complete investigation and determination of equitable, as well as legal, issues in the same action.

It does not necessarily follow, however, that, because both legal and equitable remedies are administered by the same court, a party may obtain adequate relief by setting up his equities in an answer or cross-complaint, in the same action. A defendant may be, for instance, a corporation, within the control, or under the influence, of the plaintiff, and those representing or interested with him in the recovery of the judgment, or establishment of the status for which the action was brought, in such way, and to such an extent, as to be without power to make any defense whatever, although having been duly and regularly served with process. This has often occurred. An instance was afforded in the case of Ex-Mission L. & W. Co. v. Flash.[50]

whaite v. Ghiselin, 97 Mo. 420, 10 S. W. 482; Cotton Mills v. Mills, 115 N. C. 475, 20 S. E. 770, 116 N. C. 647, 21 S. E. 431.

49 Jenkins v. Harrison, 66 Ala. 345; Worthington v. Curd, 22 Ark. 277; Kersey v. Rash, 3 Del. Ch. 320; Pallock v. Gilbert, 16 Ga. 398, 406, 60 Am. Dec. 732; Hording v. Hawkins, 141 Ill. 572, 33 Am. St. Rep. 351, 31 N. E. 307; Bachelder v. Bean, 76 Me. 370; Mosby v. Wall. 23 Miss. 81, 55 Am. Dec. 71; Spaur v. McBee, 19 Or. 76, 23 Pac. 818; Dunham v. Downer, 31 Vt. 249; Johnson v. Christian, 128 U. S. 574, 9 Sup. Ct. Rep. 87; Crim v. Handley, 94 U. S. 652.

50 97 Cal. 610, 32 Pac. 600.

§ 760. Remedy by motion or otherwise in court where action tried as bar.

In all the states, and in the federal courts, the right to move in some form, for a new trial exists. It is generally given by statutes specifying several grounds, and making liberal provisions for making the remedy effective. When not thus fully given and prescribed, the common-law right is recognized. That remedy is the more appropriate for all errors, irregularities and other defects covered by it; and a party will not be permitted to let the opportunity to obtain a new trial pass unimproved, and then obtain the relief in equity which he might, by a timely application, have obtained on such motion.[51] And where a wrongful or inequitable feature of a judgment which has been affirmed on appeal might have been corrected by a motion for a rehearing in the appellate court, a failure to apply for it may bar relief by suit in equity.[52] Nor can equity be resorted to for relief from any matter which might have been corrected on appeal;[53] and the courts of a few states hold that the right to an extraordinary remedy, such, for instance, as certiorari and mandamus, will be sufficient cause for refusing relief in equity.[54] But, in Merriman v. Walton,[55] it was held that certiorari was not such an adequate remedy as would debar a party injured by the wrongful and ultra-jurisdictional conduct of a justice of the peace, acting in collusion with the plaintiff, wherey a judgment was entered against the defendant, without notice and

51 Hurlbut v. Thomas, 55 Conn. 181, 3 Am. St. Rep. 43, 10 Atl. 556; Hulett v. Hamilton, 60 Minn. 21, 61 N. W. 672; Woodward v. Pike, 43 Neb. 777, 62 N. W. 230; Hamblin v. Knight, 81 Tex. 351; 26 Am. St. Rep. 818, 16 S. W. 1082.

52 Roebling v. Stevens etc. Co., 93 Ala. 39, 9 South 369; Russell v. Slaton, 38 Ga. 105; Phelan v. Johnson, 80 Iowa, 727, 46 N. W. 68.

53 This is but another form for saying that equity will not interfere for the correction of errors and irregularities which may be reviewed on motion for new trial, or appeal: See Hollenbeck v. McCoy, 127 Cal. 21, 59 Pac. 201.

54 Wingfield v. McLure, 48 Ark. 510, 3 S. W. 439; Galveston etc. Co. v. Ware, 74 Tex. 47, 11 S. W. 918; Kanawha etc. Co. v. Ryan, 31 W. Va. 364, 13 Am. St. Rep. 865, 6 S. E. 924; Crandall v. Baern, 20 Wis. 640, 91 Am. Dec. 451.

55 105 Cal. 403, 38 Pac. 1108.

without a trial from enjoining the enforcement of the judgment. Where, however, mandamus would be sufficient to secure to a party the entirely adequate, more direct, and expeditious remedy of a review on appeal, being, in fact, auxiliary to an appeal a party should be held bound to resort to it, and perfect his appeal, in preference to an abandonment of the appeal and resort to an independent suit in equity.[56]

The right to move in the court where the judgment was rendered for relief against judgments recovered without jurisdiction of the person of the defendant, and failure without good reason, to resort to such remedy, will, in most jurisdictions, constitute a bar to relief in equity against the judgment. On the question of whether the party, not having been negligent in the first instance, is bound to resort to proper proceedings, by motion or otherwise, in the action, or may elect between that and an independent application in equity, the authorities are far from uniform. But the authorities to the effect that, while the former remedy exists, it must be resorted to in preference to an equitable action, preponderate.[57] And it often happens, where an equitable remedy is

56 Boyd v. Weaver, 134 Ind. 266, 133 N. E. 1027.

57 See Logan v. Hillegas, 16 Cal. 201; Bibend v. Kreutz, 20 Cal. 109; Sanchez v. Carrigan, 31 Cal. 171; Luco v. Brown, 73 Cal. 3; 2 Am. St. Rep. 772, 14 Pac. 366; Comstack v. Clemens, 19 Cal. 77; Gates v. Lane, 49 Cal. 266; Ede v. Hazen, 61 Cal. 360; Morris v. Morris, 76 Ga. 733; Hollinger v. Reeme, 138 Ind. 33, 45 Am. St. Rep. 402, 36 N. E. 1114; Mason v. Miles, 63 N. C. 564; Whitehurst v. Transportation Co., 109 N. C. 342, 13 S. E. 937; Crocker v. Allen, 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650. A statute of North Dakota (Rev. Codes, § 5298), authorizes the district court, at any time within one year after notice of a judgment, to relieve a party therefrom when the same was "taken against him through his mistake, inadvertence, surprise or excuseable neglect." It was held that an independent action in equity would not lie to enjoin the collection of a judgment so taken, since the remedy at law by motion was adequate: Kitzman v. Minnesota Thresher Mfg. Co., 10 N. Dak. 26, 84 N. W. 585. A defendant in a foreclosure suit cannot maintain an independent suit to set aside a default decree of foreclosure and enjoin the execution of a sheriff's deed to a purchaser on the ground that the decree was for a larger sum than demanded in the complaint, the remedies by motion being ample in such case: George v. Nowlon, 38 Or. 537, 64 Pac. 1.

sought against the inequitable enforcement of a judgment which has been satisfied, in whole or in part, as well as where a tender has been made of all which can be lawfully demanded under the judgment, and the same has been rejected and a further enforcement of the judgment persisted in, that the party has a complete remedy by motion in the same court, to recall the execution, to have entry of satisfaction, and the like. Where such is the case, it is a complete answer to an application for equitable relief.[58] Unless, however, the remedy by motion appears adequate, it will not stand in the way of the equitable remedy.

The rule governing courts of equity, where a remedy by motion for new trial existed in the action at law, but has been lost through neglect, was thus stated by Justice Sanderson, delivering the opinion, in Mastick v. Thorp:[59] "That the complaint contains no cause of action hardly admits of debate. That it does not, is manifest from the single fact, independent of the matters set out, that the complaint assigns no reason why the plaintiffs did not avail themselves of the remedy afforded by a motion for a new trial. If they were informed of the trial and judgment in time to move for a new trial, that remedy would have been all-sufficient, and that they were not informed in time is not alleged. We are compelled, therefore, to assume that they did not learn it in time.

58 Cline v. Lowe, 3 Ind. 527; Gorsuch v. Thomas, 57 Md. 334; Parker v. Jones, 5 Jones Eq. 276, 75 Am. Dec. 441; Morrison v. Speer, 10 Gratt. 228; Howell v. Thomasson, 34 W. Va. 194, 12 S. E. 1088; United States v. McLemore, 4 How. 286.

59 29 Cal. 445, 447. It was held that an action brought more than a year after a judgment was rendered, to vacate and amend it, could not be maintained where no motion was made in the original action and no reason was alleged why application in the original action was not seasonably made: Long v. Eisenbeis, 18 Wash. 423; 51 Pac. 1061. See Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232, holding no negligence in refusing to move in the court imputable to party without notice: Thompson v. Laughlin, 91 Cal. 313, 318, 27 Pac. 752, holding under circumstances there was no negligence in failing to move for a new trial: Heller v. Dyerville Mfg. Co., 116 Cal. 127, 135, 47 Pac. 1016, where it was held that the plaintiff had negligently lost an adequate remedy by motion under section 473 of the Code of Civil Procedure.

Such being the case, they were bound to exhaust their legal remedies by moving for a new trial in the court of law before coming to a court of equity to obtain it. By this action, the plaintiffs can obtain no relief which they could have obtained by a motion for a new trial in the original action; for, if their neglect to defend that action admits of legal excuse, full relief was attainable in that action by motion, and no resort to this action was necessary. For this reason alone, they cannot be allowed to maintain this action without showing that they had no opportunity to make the motion, by reason of some mistake, accident, or surprise, unaccompanied by any fault or negligence on their part."

But, if the complainant be free from laches, his failure to discover his mistake until too late to avail himself of his remedy by motion for a new trial, will not deprive him of his right to apply to equity for relief against a judgment which it would be unjust and inequitable to enforce against him. The fact that he is thus left without remedy at law makes his claim to equitable relief all the stronger;[60] and the objection that a party has other remedy, by motion (as, for instance, a motion in the same court to recall the execution), is waived by going to trial on the merits.[61]

§ 761. Concurrent remedies by motion and suit in equity further considered.

The rule that a failure to move in the original action will bar an application for relief in equity, extends no further than the extent to which it is supported in reason; and where no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity.[62] And the general rule is inapplicable where the entire relief to which the party is entitled can only be obtained by independent suit in equity. Thus, in Ex-Mission L. & W. Co. v. Flash,[63] where it was urged that the

60 Currier v. Esty, 110 Mass. 536.

61 Wood v. Currey, 49 Cal. 357.

62 Bibend v. Kreutz, 20 Cal. 109; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232.

63 97 Cal. 610, 631, 32 Pac. 600.

plaintiff had been negligent in not availing himself of remedies afforded in the original action, the court said: "The only relief to which the corporation would have been entitled on such motion was the setting aside of the judgment and default, with leave to answer, which would have been but one step circuitously leading to the same equitable relief which has been directly obtained by this suit. The very next step must have been the commencement of a distinct suit in equity, which, though called a cross-suit, commenced by a cross-complaint, would have been, in fact and substance, the same as this suit; and I am unable to perceive why, on the score of equitable jurisdiction, such cross-suit would have been less objectionable than this suit. Should it be claimed that the corporation might have obtained complete and adequate relief in the foreclosure suit by simple answer without a cross-complaint, the answer is, that adequate and complete relief embraced the cancellation of the notes and mortgage, and possibly more, which is affirmative relief that could not have been obtained without a cross-complaint in the foreclosure suit, or a separate suit in equity."

§ 762. No jurisdiction as to judgments fixing status of persons or property.

The doctrine of noninterference with final determinations in probate proceedings, and the general rule of noninterference with adjudications in rem, have been established limitations upon the jurisdiction concurrently with the assertion of such jurisdiction itself. The nonapplicability of such equitable remedy, in a case of a probate of a domestic will, was declared in People v. McGlynn,[64] where the court said: "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence, there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for

[64] 20 Cal. 234, 81 Am. Dec. 118.

the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day, it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the principle established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exceptions in cases of wills, but was compelled to yield to the weight of authority." And in case of a will probated abroad, and admitted to probate in California on the strength of the foreign probate, the same rule was held applicable in Goldtree v. McAllister.[65]

The probate of a will establishes its status, and such status adheres to the will and concludes the whole world, subject only to be avoided by such direct proceedings to that end, as may be provided by some affirmative law.[66] The reason for the rule exempting probate proceedings and the judgments rendered therein from equitable interference is that they are in the nature of proceedings in rem. In other words, such judgments are founded in proceedings, not against persons, as such, but against, or upon, the thing or subject matter itself, whose status or condition is to be determined; and the judgment, when rendered, is a solemn declaration of the status of the thing, and, ipso facto, renders it what it declares it to be. And decrees of sale of the real estate of lunatics and deceased persons, stand upon the same footing.[67]

65 86 Cal. 102, 24 Pac. 801.

66 Kearney v. Kearney, 72 Cal. 591, 593, 15 Pac. 769; State v. McGlynn, 20 Cal. 234, 81 Am. Dec. 118; Deslonde v. Darrington's Heirs, 29 Ala. 95; Woodruff v. Taylor, 20 Vt. 65; 2 Smith's Lead. Cas., 6th Am. ed., 669, and cases cited.

67 Kearney v. Kearney, 72 Cal. 594, 15 Pac. 769; Latham v. Wiswell, 2 Ired. Eq. 294; Wyman v. Campbell, 6 Post. 219, 31 Am. Dec. 677. In the first case above the court said: "The probate of a will establishes its status, and such status adheres to the will and

Notwithstanding, however, the positive, unqualified, affirmation of the rule in Kearney v. Kearney,[68] and in other cases, there appeared, in a later case,[69] an unwillingness to permit it to rest, without an intimation that there might be such a showing of extrinsic fraud in such a case as would warrant relief in equity, the court saying: "Conceding then, without deciding, that the rule as to extrinsic or collateral frauds applies to judgments or decrees of probate courts, the question is, Are the allegations here sufficient to bring this case within the rule? But the context shows that this was an unguarded expression, following an examination of authorities on the question of equitable interposition where extrinsic fraud had been responsible for judgments in adverse proceedings in personam."

Strenuous efforts have been made from time to time in various jurisdictions, to obtain modifications of, and to establish exceptions to, the rule. It has often been insisted that there is no more reason for refusing to restrain parties, over whom the court has acquired jurisdiction, from using the advantage acquired by the probate of a forged will, or of one which has been revoked, than in other cases. But the rule,

concludes the whole world, subject only to be avoided by such direct proceedings to that end as may be provided by some affirmative law: 2 Smith's Lead. Cas., 6th Am. ed., 669, and cases cited; Deslonde v. Darrington's Heirs, 29 Ala. 95; Woodruff v. Taylor, supra; State v. McGlynn, 20 Cal. 234, 81 Am. Dec. 118. Decrees of sale of the real estate of lunatics and deceased persons stand upon the same footing: Latham v. Wiswell, 2 Ired. Eq. 294; Wyman v. Campbell, 6 Port. 219, 31 Am. Dec. 677. A prominent distinction between proceedings in personam and proceedings in rem consists in the different methods by which jurisdiction is obtained by the court. In the former, jurisdiction of the parties is obtained by personal service or its equivalent, while in the latter, or at least in such cases coming under that head as relate to things exclusively, jurisdiction is acquired by taking possession of the thing, or by some act tantamount thereto, and a judgment in rem in such a case binds the 'res in the absence of any personal notice to the parties': The Globe, 2 Blatchf. 427, Fed. Cas. No. 5483. The parties in interest in such cases are deemed parties to the suit without personal notice: Thoms v. Southard, 2 Dana, 475, 26 Am. Dec. 467."

68 72 Cal. 594, 15 Pac. 769.

69 Langdon v. Blackburn, 109 Cal. 25, 41 Pac. 814.

when its foundation is closely examined, does not rest alone upon the proposition that a probate proceeding is, in its nature, a proceeding in rem, but may well be grounded on the general principle, applicable alike in all cases, where relief is sought against judgments, that, in establishing a will, or settling an inheritance, all questions involved are litigated and necessarily passed upon, and the rights of all parties having interests in the estate, are constructively, if not actually, before the court.

Not without apparent inconsistency, certain probate proceedings have been subjected to this corrective jurisdiction. It has been held that relief might be granted against orders or decrees of courts of probate jurisdiction settling the accounts of guardians, executors, and administrators.[70] But it is not thought that any such relaxation of the limitation would be permitted in states where liberal provisions on the subject of new trials, and other forms of relief by motion in such courts as well as by appeal, are found.

Judgments and decrees in partition are not within the exception here considered. They are as much subject to interference, on the ground of fraud, mistake, and inadvertence, as other judgments. The jurisdiction has been frequently exercised in cases of mistakes in matters of description in the reports of commissioners, when carried into the final judgment, or decree, without being discovered.[71]

§ 763. Fraud as ground for relief.

A misunderstanding as to the true relation of the equitable tribunal to the original action against whose result relief was sought has been the cause of numerous mistakes in practice, and in no class of cases have these mistakes, and consequent disappointments, occurred more frequently than where fraud

70 Mack v. Steele, 34 Ala. 198, 73 Am. Dec. 455; Salter v. Williamson, 2 N. J. Eq. 480, 35 Am. Dec. 513; Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Eldred v. Lancaster, 2 Head, 571, 75 Am. Dec. 749.

71 Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777; Smith v. Butler, 11 Or. 46, 4 Pac. 517; Snyder v. Ives, 42 Iowa, 157; Marvin v. Marvin, 52 How. Pr. 97; Wilbur v. Dyer, 39 Me. 169; Douglass v. Vich, 3 Sand. Ch. 439.

or trickery of the plaintiff in the legal forum were relied upon. That such plaintiff based his action on a most unconscionable and unmeritorious demand, that it was supported entirely by perjury, and fabrication of evidence, that he suborned witnesses, forged documentary evidence, and resorted to every kind of knavery intimidation, corruption and sharp practice, though alleged in an application, would be entitled to no consideration unless he went further and alleged some deception practiced upon himself by which he was prevented from presenting a defense, or that he was prevented by some excusable ignorance of facts, accident or mistake with reference to which he was in no way at fault. It is the duty of such party to present his whole case in the original action, and if there the other party presents a claim having no real merit, he must oppose, with such skill and resources of evidence and argument, as he is able to command. If defeated, he must resort to the usual motions and proceedings provided by law for the correction of error. After a trial has ended, a verdict has been returned, or findings filed, and judgment entered, there is only one way by which a court of co-ordinate jurisdiction could ascertain whether the judgment was for the wrong, or for the right, party, and that is by a retrial of the whole case. But, if the successful party has succeeded by fraud in depriving the losing party of the opportunity to present a valid defense to the action, or has proceeded without having, in fact, given the court jurisdiction to try the case itself, a fraud of most reprehensible character, that constitutes a ground of attack in equity, being a cause of equitable cognizance, and a matter extrinsic to the merits of the case; in other words, an "extrinsic fraud," sometimes designated as "a fraud on the jurisdiction." [72] In Amador C. & M. Co. v. Mitchell,[73] the court said: "This finding leaves the respondent no equity whatever, for judgments are impeachable for

72 See Amador etc. Co. v. Mitchell, 59 Cal. 168; Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908; Watts v. Frazer, 80 Ala. 186; Payne v. O'Shea, 84 Mo. 129; Irvine v. Leyh, 124 Mo. 361, 27 S. W. 512; Griffith v. Reynolds, 4 Gratt, 46; Muscatine v. Mississippi etc. R. R. Co., 1 Dill. 536, Fed. Cas. No. 9971; Ross v. Wood, 70 N. Y. 8; Peck v. Jenness, 7 How. (U. S.) 624.

73 59 Cal. 168, 179.

those frauds only which are extrinsic to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal." The rule of all the best considered, and more recent, cases upon the subject is that the party must have failed in obtaining redress, or escaping judgment, by the fraud of the opposite party, or inevitable accident or mistake, without any default, either of himself or his counsel.[74]

While, ordinarily, parties are not bound to make any disclosures whatever to their opponents in the litigation, owing no obligation herein, and may conceal their knowledge of facts without any imputation of fraud, yet, peculiar circumstances and relations have given rise to exceptional decisions. In these cases, the concealment was distinguished from ordinary concealment of knowledge by being designated as "fraudulent concealment." It certainly cannot be reasonably claimed that a party is ordinarily bound to make any disclosures to his adversary, in the case of facts within his knowledge, and, the more important, the greater reason there would ordinarily be for not requiring it. But it is otherwise where a fiduciary relation exists, or has existed, between them, with reference to the subject matter of the litigation. In that case, neither party should be permitted to profit by a concealment of anything which places the other at a disadvantage in the action. This duty of mutual disclosure has been frequently recognized in cases of administrators, executors, and others holding fiduciary relations; and relief has been granted in equity against judgments which, by reason of such superior knowledge and concealment, on the one side, and want of knowledge on the other, the trustee has been enabled to recover unjustly.[75]

But equitable relief has been awarded on account of concealments in cases of the entire absence of a fiduciary rela-

74 Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908; Ede v. Hazen, 61 Cal. 360; Weir v. Vail, 5 Cal. 466, 4 Pac. 422; French v. Garner, 7 Port. 549; United States v. Throckmorton, 98 U. S. 61.

75 See Pratt v. Northam, 5 Mason, 95, Fed. Cas. No. 11,376; Mitchell v. Shaneberg, 149 Ill. 420, 37 N. E. 576.

tion. In these cases, there were no reasons in favor of the jurisdiction, except a characterization of the concealment as "fraudulent." They were cases in which there was an entire absence of a cause of action, the claims brought forward being outright fabrications. Nevertheless, they find no support upon any recognized head of equitable jurisdiction to grant relief against judgments at law. The frauds were strictly within, and in no respect outside, the issues tried in the law court. One such case was that of Taylor v. Nashville etc. R. R. Co.[76] In that case, the judgment had been recovered upon municipal bonds, upon which a previous judgment had been obtained by the true owner, after which they were stolen and put in suit, and the judgment recovered, against which relief was sought. The court recognized a distinction between ordinary concealment and "fraudulent" concealment, saying: "The general rule which holds a party negligent who fails to develop every fact which would defeat a recovery upon an iniquitous demand is a reasonable rule, but it has its qualifications and reasonable limitations, and we hold that where a judgment was obtained from the mala fides of the plaintiff, who, at the time, knew that the judgment was contrary to the facts and truth, and where it further appears that the defendant was at the time ignorant of the existence of the very facts which make the judgment unconscionable, and where there was nothing in the circumstances of the litigation or the trial calculated to arouse the suspicion of a prudent man to the fact of a fraud being practiced, a court of equity will interpose and restrain proceedings upon such a fraudulent judgment; and the fact that the defense could have been made at law, and that the evidence was accessible, will not, in such a case, be such negligence as to restrain the exercise of the jurisdiction of this court." It is claimed in all such cases of relief being granted, that they are distinguishable from cases of ordinary and proper concealment, by the presence of an ac-

76 86 Tenn. 228, 241, 6 S. W. 393. See, also, Dunn v. Miller, 96 Mo. 324, 9 S. W. 640; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. Rep. 62, cases where relief was granted against judgments at law obtained through the use of forged deeds. Other illustrations of exceptional exercise of jurisdiction may be found in an elaborate note, 54 Am. St. Rep. p. 233, et seq.

tual fraudulent intent; and where it was apparent that there was none, relief was withheld. Thus, where judgment was entered in favor of one in the capacity of the widow of a deceased, and the application to equity disclosed that, while she had been married prior to her marriage to the deceased, and notwithstanding that she supposed she was divorced from that marriage, yet the decree of divorce was void, the court refused the relief, it not appearing that the woman did not, in good faith, believe the divorce valid.[77]

Excluding from consideration all exceptional and peculiar instances of the exercise of jurisdiction to grant relief, there remain many forms of overreaching deception and trickery which may be, and which the cases show, have been resorted to in practice, and covered by the term "extrinsic fraud." Any unconscionable act whereby the successful party prevents the other from presenting fairly his cause of action, or having the benefit of a valid defense, will entitle the latter to equitable relief against the judgment, the other matters essential to equitable interference being shown.[78]

A method of fraud frequently met with in the decisions is where a stipulation or agreement relating to the conduct of the case has been obtained and then violated, with knowledge that the other party was relying upon it, and without notice to him. In such cases, relief will invariably be granted, upon application seasonably presented. Such stipulations are often

77 Thomas v. Thomas, 88 Wis. 88, 59 N. W. 504.

78 See Hayden v. Hayden, 46 Cal. 332; Carrington v. Holabird, 17 Conn. 530; Brown v. Thornton, 47 Ga. 474; Schroer v. Pettibone, 163 Ill. 42, 45 N. E. 207; Hogg v. Link, 90 Ind. 346; Young v. Tucker, 39 Iowa, 600; Hahn v. Hart, 12 B. Mon. 426; Kent v. Richards, 3 Md. Ch. 392; Street v. Alden, 62 Minn. 160, 54 Am. St. Rep. 632, 64 N. W. 157; Ward v. Quinlivin, 57 Mo. 425; Tompkins v. Tompkins, 11 N. J. Eq. 512; Binsse v. Baker, 13 N. J. L. 263, 23 Am. Dec. 720; Stevens v. Central Nat. Bank, 144 N. Y. 50, 39 N. E. 68; Lockwood v. Mitchell, 19 Ohio, 448, 53 Am. Dec. 438; Greene v. Haskell, 5 R. I. 447; Crank v. Flowers, 4 Heisk. 629; Pandexter v. Waddy, 6 Munf. 418, 8 Am. Dec. 749. Where the plaintiff by false representations and concealment prevents material facts, favorable to the defendent, from being presented to the court, and thereby obtains a decree prejudicial to the defendant, a court of equity will set it aside: Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121.

entered into by the prevailing party in bad faith in the first instance. The fraudulent use made of such an agreement was illustrated in California Sugar Beet Co. v. Porter,[79] where the court applied to the facts the following language: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney, fraudulently or without authority, assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side; these, and similar cases, which show that there has never been a real contest on the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

Taking judgment without informing the court of a compromise between the parties, involving the payment of money in satisfaction of the cause of action, is a frequent ground for applications for equitable relief.[80] Nor do the courts distinguish in principle, between the cases just mentioned, and those where, though there was no compromise, the plaintiff has admitted, for the purpose of gaining an advantage in the litigation which he thereby secured, that there was no cause of action against the particular defendant, or led him to believe that the case would not be pressed against him or would be dismissed as to him.[81] And it was held a proper case for

79 68 Cal. 369, 9 Pac. 313. Relief was also granted upon like showing in the following cases: Chambers v. Robbins, 28 Conn. 552; Baker v. Redd, 44 Iowa, 179; Murphy v. Smith, 86 Mo. 333; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891.

80 See Pearce v. Olney, 20 Conn. 544; Gates v. Steele, 58 Conn. 316, 18 Am. St. Rep. 268, 20 Atl. 474; Rogers v. Gwinn, 21 Iowa, 58; Neal v. Dicks, 72 Ind. 374; Edwardson v. Mosby, 4 J. J. Marsh, 497; Weirich v. De Zaya, 2 Gilm. 385; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152, and note, Hibbard v. Eastman, 47 N. H. 509, 93 Am. Dec. 467.

81 McLeran v. McNamara, 55 Cal. 508; Purviance v. Edwards, 17 Fla. 140; Johnson v. Unversaw, 30 Ind. 435; Stone v. Lewman, 28

relief that a defendant allowed judgment to go against him upon a promise that, if defendant would pay a stipulated sum, less than the judgment, satisfaction thereof would be entered; and it appears immaterial whether the fraudulent conduct occurs during the trial, or intervenes afterward, so as to deprive the party of the benefit of a motion for a new trial. In Thompson v. Laughlin,[82] the court said: "The court finds that this agreement was made, and that, in consequence, the plaintiff neglected to move for a new trial of the action, and that appellant's attorney repudiated the agreement after the time to move for a new trial had expired. It must be presumed that, by reason of this conduct of appellant's attorney, the plaintiff was deprived of the substantial right to have the judgment set aside, and a new trial of the action, for it cannot be supposed that this motion would have been denied if the granting thereof was necessary in order to work that justice which is sought in this action. It may be true that this agreement was not put in such form that it could be enforced, and that the attorney had no authority, as such, to release the judgment for the sum agreed upon. But this is not an action to enforce the agreement, but it is to prevent the appellant from retaining the benefit of an unfair advantage, obtained by the representations and assurances of his attorney, and which would be an act of fraud upon the part of the appellant to retain, with knowledge of the facts."

Ind. 97; Greenwaldt v. May, 127 Ind. 511, 22 Am. St. Rep. 660, 27 N. E. 158; Cadwallader v. McClay, 37 Nev. 359, 40 Am. St. Rep. 496, 55 N. W. 1054. Cases of fraudulently depriving party of opportunity to defend or present his case: Johnson v. Loop, 2 Tex. 331, fraudulent procurance of written authority to confess judgment; De Lomis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491, inducing attorney for party to abandon his client; Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364; Beck v. Bellamy, 93 N. C. 129, to same effect; Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715, conspiracy between persons to prevent the appearance of party; Griswold v. Hicks, 132 Ill. 494, 122 Am. St. Rep. 549, 24 N. E. 63, collusion and concealment from court of party's interest in violation of trust and duty to represent party. For other cases in which parties were lulled into security by which unjust judgments were taken against them, from which they were afterward relieved in equitable actions, see Broadus v. Broadus, 3 Dana, 536; Brake v. Payne, 137 Ind. 479, 37 N. E. 140.

82 91 Cal. 313, 27 Pac. 752.

Courts of equity do not, in such cases, proceed upon the theory of enforcing, or that they have any power to enforce, agreements and stipulations between parties and their attorneys, but regard these merely as the instrumentalities through which frauds have been perpetrated. So viewing them, it is no defense to an application for equitable relief that the agreement is itself not capable of being enforced, or even that it is void.[83]

The fraud justifying relief may consist in bringing on the action for trial at a time when the plaintiff knows the defendant has no notice and does not expect it to be tried.[84]

§ 764. Further as to meaning of extrinsic fraud.

The cases in which a court of equity is authorized to interfere and set aside a former judgment, on the ground of fraud, are those only where the fraud was extrinsic or collateral to the matter tried.[85] In Pico v. Cohn,[86] the court defines the cases of fraud in obtaining judgments which can be reached in equity as follows: "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an in-

83 Gulf etc. Ry. Co. v. King, 80 Tex. 681, 16 S. W. 641; Blakesley v. Johnson, 13 Wis. 530.

84 Miles v. Jones, 28 Mo. 87.

85 United States v. Throckmorton, 98 U. S. 61; In re Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Steen v. March, 132 Cal. 616, 64 Pac. 994. In the last case herein cited the court said: "I think the demurrer was properly sustained. Appellant apparently relies upon the proposition, which he states without qualification, that 'equity will grant relief against fraudulent judgments.' Among the authorities cited are Hayden v. Hayden, 4 Cal. 333; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; and Amador etc. Co. v. Mitchell, 59 Cal. 168. But the fraud alleged in the complaint does not bring this case within the requirements of either of those cases.' In each of those cases it is held that judgments are impeachable for those frauds only which are intrinsic to the merits of the case. In Pico v. Cohn, it was said that 'the fraud which Cohn committed was the production of perjured evidence in support of his defense'; but the court refused to set aside the judgment."

86 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537.

congruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate decree, from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But, whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day, it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the principle established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exception in cases of wills, but was compelled to yield to the weight of authority."

There is an important distinction, under the rule confining relief to extrinsic fraud, between cases in which the defendant in an action has had actual notice of the action by the service of the summons, and those in which the court has acquired jurisdiction by constructive service. In the latter case, if the alleged cause of action was wholly unfounded in fact, it is considered that the filing of the affidavit upon which the order of publication is based, setting forth that the cause of action is meritorious expressly, or by reference to the complaint, is itself a fraud on the jurisdiction; and that the defendant, subsequently learning that such judgment has been rendered may attack it in equity, alleging the baseless character of the claim as well as his defense, the opportunity for presentation of which he has been deprived. An important case in point was that of Dunlap v. Steere.[87] In that case, after referring to the general rule of limitation to extrinsic fraud, the court reasoned thus: "The fact as found by the court below brings this case fully and clearly within the oper-

[87] 92 Cal. 244, 27 Am. St. Rep. 143, and note, 28 Pac. 563.

ation of the rule of equity just cited. In the first place, the defendant practiced a fraud upon the court as well as upon the present plaintiff, in procuring the order for the publication of the summons in the action referred to. Under section 412 of the Code of Civil Procedure, a plaintiff is entitled, under certain circumstances, to procure such an order; but, in order to be so entitled, he is required by that section to first present to the court or judge, either in the form of a verified complaint or an affidavit, a statement of facts showing that a cause of action exists in his favor against the defendant. Such an affidavit was presented by the defendant here in the action which resulted in the judgment now sought to be set aside, but it necessarily results from the findings of the court that not only was the defendant's affidavit false in this respect, but that he knew that it was false. An affidavit of this character is always ex parte. The absent defendant is not present to impeach it, and if it is sufficient in form, the court cannot disregard it, but is compelled to accept its statement as true, and make the order which is demanded. Under the circumstances, a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons must exercise good faith in representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose of obtaining an order for service of the summons for publication is itself an act of fraud; and when the judgment which rests upon it is itself unconscionable, and was obtained without the knowledge of the defendant therein, it should be set aside." The court, after referring to the contention of counsel that the fraud complained of was intrinsic, and therefore the defendant was concluded by the judgment upon authorities named, proceeded as follows: "But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual *notice* of the pendency of the action, and neglected to submit his proofs. The case just mentioned was one in which a retrial of an action which had been once fully tried was asked, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense

to the false and fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his right therein, and his failure to defend was not a negligent omission on his part." In support of this decision the court cited several excellent authorities to the same effect.[88]

§ 765. Fraud consisting in unauthorized appearance of attorney.

Fraud upon the jurisdiction affording ground for relief has frequently taken the form of an unauthorized appearance of an attorney for the party seeking the relief. While it is questionable if collusion and fraud is not more promoted by maintaining the jurisdiction to grant relief on this ground than by denying it, yet it appears by a weighty preponderance of authority that, upon a clear and satisfactory showing that the attorney was absolutely without authority, relief against the judgment should be granted in such cases.[89]

It is in most of the states required, in order to induce interference on such ground that the party has been deprived of the opportunity to present a good defense or cause of action, and which has been lost by the unauthorized appearance.[90] In

88 United States v. Throckmorton, 98 U. S. 61; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 86; Adams v. Secor, 6 Kan. 542; Tompkins v. Tompkins, 11 N. J. Eq. 512; Irvine v. Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10.

89 Handley v. Jackson, 31 Or. 556, 65 Am. St. Rep. 839, 50 Pac. 915; Harshey v. Blackman, 20 Iowa, 161, 89 Am. Dec. 520; Great etc Min. Co. v. Woodmas Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Williams v. Neth, 4 Dak. 360, 31 S. W. 630; De Lomis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491; Gifford v. Thorn, 9 N. J. Eq. 702, 722; Allen v. Slone, 10 Barb. 547; Ellsworth v. Campbell, 31 Barb. 134; Jones v. Williamson, 5 Cold, 371; Glass v. Smith, 66 Tex. 548, 2 S. W. 195; McEachern v. Brackett, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690. Unauthorized appearance of attorney no bar to setting aside judgment for want of jurisdiction: Baker v. O'Riordon, 65 Cal. 368, 4 Pac. 232; Hill v. City Cab etc. Co., 79 Cal. 188, 21 Pac. 728.

90 See Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Piggott v. Addicks, 3 G. Greene, 428, 56 Am. Dec. 547; Colson v. Leach, 110 Ill.

some of the states it is held, however, that, where judgment has been entered without service of process, no jurisdiction having been acquired over the person, appropriate relief will be granted without inquiry touching the merits of the original claim.[91]

The learned opinion by Justice Dillon in Harshey v. Blackman,[92] may be considered as having turned the scale of authority in the United States in favor of the equitable jurisdiction to grant relief in such cases, it having been generally followed. In its course he said: "It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by a judgment of a court without a day in court. It relieves the other party of a duty which, in reason, belongs to him, viz., to serve his process, and to see, at his peril, that his adversary is in court. And it carries out this unsoundness by compelling the wrong party to look to the attorney. True, reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified and promptly disavowed, and if the adverse party, being ignorant of the want of authority, and carelessly omitting to serve process, or to require the attorney to show his authority has been damaged, he, and not myself, should be the one to look to the attorney."

Among the frauds, warranting relief in equity, are instances of the attorney for a party betraying his trust and entering into collusion with the opposite party, resulting to his detriment. In such case the court of equity has nothing to do on the application for relief from the judgment with the injury thus done to his client by the derelict attorney; but the participation of the opposite party fastens on him the guilt of both.

504; Handley v. Jackson, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915; Sauer v. Kansas City (City of), 69 Mo. 46.

91 See Great West Min. Co. v. Woodmas Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; Bowen v. Allen, 113 Ill. 54, 55 Am. Rep. 398.

92 20 Iowa, 161, 89 Am. Dec. 520.

§ 766. Mistake as ground for relief.

Mistake is one of the most fruitful heads of equitable jurisdiction. The reason for not more frequently applying to courts of equity for relief on the ground of mistake pertaining to judgments is doubtless due to the extensive powers given to all courts where mistakes occur to correct them on motion, and, generally, upon attention being called to them, without motion.[93]

Courts of equity have always freely exercised jurisdiction to correct mistakes in their own decrees, and have often opened decrees regularly obtained by default, even after enrollment, for the purpose of enabling a party to defend on the merits when he was deprived of the opportunity to do so by accident or mistake.[94] But when a petition to amend a judgment does not exhibit the entire record on which it was based, and the reformation demanded is a material change, in substance, of the judgment, any seeming inconsistency between the portions of the record pleaded will be presumed to be explained by that portion of the record not shown.[95]

The mistakes in actions against which relief will be granted must not only be such as could not, and were not, discovered in time to be corrected by motion, but are of fact, and not merely of law. "We are not, however, prepared to say that a mere mistake in law of a party would give this court jurisdiction, although there are some cases which seem to go that far. It seems to this court this would be laying down the principle too broadly. There must, in general, be other circumstances to authorize the interference of a court of equity. Perhaps it would be well to make the case, in addition to a mistake in point of law, one in which it would be against conscience for the other party to insist upon, or which at once would shock the moral sense if enforced."[96]

93 For this reason equity will not relieve against mistake apparent upon face of judgment: Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

94 Willard Eq. 78; Kemp v. Squire, 1 Ves. Sr. 205; Beckman v. Peck, 3 Johns, Ch. 415.

95 Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

96 Oliver v. Pray, 4 Ohio, 175, 19 Am. Dec. 595, note, per Swan, J. A mere mistake or ignorance of law is not sufficient ground for the interpositon of equity: Hubbard v. Martin, 8 Yerg. 498; Mum v.

Parties have sometimes undertaken to obtain relief in equity against judgments recovered against them at law which they might have escaped but for the ignorance, blunders or lack of understanding on the part of their counsel. But these do not come within the legal definition of mistake or accident and surprise, and will not avail for the purpose of disturbing a judgment at law.[97]

But clear cases of mistake of fact, unmixed with negligence, by which an unjust result has been reached in an action at law, or even in a statutory proceeding will be readily relieved against in equity upon proper presentation. And when in a partition suit the commissioners appointed to make partition among heirs had, by mistake, set off to one of them land outside the true boundary, whereby he was deprived of his interest in the estate, and judgment was entered thereon without discovering the mistake, a repartition was decreed upon bill in equity. In passing upon the question the court said: "Was the mistake here complained of such a one as a court of equity will relieve against? We think it was. It was clearly extrinsic and collateral to the question examined and determined in the action, and led the court to do what it evidently never intended to do—that is, to confirm to the plaintiffs a piece of land not described or referred to in the complaint or in the findings or interlocutory judgment, and which was then owned and in the adverse possession of one not a party to the suit." [98]

Relief will be granted, not only against mistakes occurring in the proceedings prior to and in the judgment or decree, by which the result is other than that intended, but also in case of such mistakes occurring subsequently to judgment, whereby the party would, without correction of the mistake, be deprived of a remedy by motion for a new trial or appeal. Accordingly, a bill was entertained to correct a mistake on the part of a

Rucker, 10 Gratt. 506. And this rule is not relaxed although the mistake of law is mutual as between the parties to the action. If the rule were otherwise a judgment at law would be of but little value: Richmond & P. R. R. Co. v. Shippin, 2 Pat. & H. 327.

97 Boston v. Haynes, 33 Cal. 31; Quin v. Wetherbee, 41 Cal. 247; Jones v. Leech, 46 Iowa, 186; Dibble v. Truluck, 12 Fla. 185; Burton v. Wiley, 26 Vt. 430.

98 Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777.

judge in writing his certificate to a bill of exception.[99] Also to correct a mistake whereby the name of counsel for a defendant was omitted from the docket, whereby a default was entered against him.[100]

The circumstances must be rare to warrant relief against mistakes in pleadings. It would ordinarily be very difficult for a party applying for relief to escape the imputation of a lack of diligence in failing to properly amend at the trial. But a bill was entertained in one case where a false and mistaken recital in a complaint was sought to be unjustly used against the pleader, by way of estoppel. The party who would profit by the mistake knew of it at the time of the rendition of the judgment in which the mistake was repeated, in the case where it occurred, but withheld information from the court and plaintiff, and it was not discovered by the latter until too late for correcting it by motion. The court held that a perpetual injunction should issue against the setting up of the record against the plaintiff in the former action, as an estoppel.[101]

§ 767. Accident and surprise as ground for relief.

In states where courts lose jurisdiction of motions for new trial unless disposed of at the term at which the action was tried, and by any unavoidable accident or misfortune the court is prevented from disposing of such motion, courts of equity will, upon a clear showing of merits in the motion, relieve the party by enjoining the judgment, unless the owner thereof consent to a new trial, or otherwise. Thus in Leigh v. Armor,[102] it was held that, where a judge of the circuit court was prevented by sickness, from disposing of a motion for new

99 Kohn v. Lovett, 45 Ga. 180.

100 Brewer v. Jones, 44 Ga. 71. See, also, Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643, where a mistake of the clerk in entering judgment was held ground for relief; Seymour v. Miller, 32 Conn. 402, where the mistake was by the clerk in entering an appeal in an unusual place, so that it could not be found by an attorney employed by a defendant resulting in a default against him in the appellate court.

101 Currier v. Esty, 110 Mass. 536.

102 35 Ark. 123.

trial during the term at which the judgment was rendered, the party filing the motion might, upon showing merits and had been guilty of no negligence, obtain the appropriate relief.

§ 768. Loss of bill of exceptions.

It is a question about which there has been considerable dispute whether in case, from any unavoidable cause, a party has been deprived of his bill of exceptions, and hence of the benefit of an appeal in an action at law, there was any power in a court of equity to afford him relief. Upon first impression, it is difficult to discover any head of equitable jurisdiction to which such a case could be held assignable. One of the best considered cases presenting the question was that of Kansas etc. Ry. Co. v. Fitzhugh.[103] But the opinion discloses that the courts of that state still claim the ancient equity powers long since abandoned by even the English courts of chancery, and never probably claimed in any other American state, of granting new trials, eo nomine in actions at law. The court said: "While the enlarged powers of law courts, under modern procedure, to grant new trials after the expiration of the term has dispensed with the frequent exercise of this ancient jurisdiction of courts of equity, yet in this state it still exists, to be used in peculiar cases where the party is without remedy at law."

It was held in an early Wisconsin case where the appeal was cut off by the death of the judge, that there could be no relief.[104] In some states the appellate courts have ordered new trials in such cases without reference to the merits.[105]

§ 769. Relief against void judgments.

A judgment obtained against a party where the record showed the want of service, actual or constructive, would be

103 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960. The case of Little Rock etc. Ry. Co. v. Wells, 61 Ark. 354, 54 Am. St. Rep. 216, 33 S. W. 208, immediately following it is of exactly the same import in which the jurisdiction was upheld. In that case the judge presiding at the trial died suddenly, pending the settlement of the bill.

104 Davis v. Menasha (Village of), 20 Wis. 194.

105 See State v. Weiskittle, 61 Md. 49; Wright v. Judge Sup Court, 41 Mich. 726, 49 N. W. 925; Board Comms. v. Old Dominion S. S. Co., 98 N. C. 163, 3 S. E. 505.

void on its face. In such case no equitable remedy would be required directly against the judgment. An equitable remedy might, however, be successfully invoked against proceedings undertaken under authority and color of even a void judgment. It is against judgments which, while regular by the record, are yet void in fact, that equitable relief is usually sought. Such judgments are usually obtained by practice which constitutes either an actual, or what is known as legal, fraud. Whatever results in a judgment against a party by a court without jurisdiction is fraudulent in its operation, without reference to the intent.

An excellent presentation of the reasons supporting the jurisdiction is found in the opinion of Chief Justice Marshall in Marine Ins. Co. v. Hodgson,[106] where he said: "That any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. . . . . Now, in the present case, this principle should apply with the greater force, because the judgment in question is to be considered as void by reason of an intrinsic fact, which cannot be averred or be made to appear in a court of law, and a court of law has not therefore any power to arrest its execution, however unjust or iniquitous. . . . . We cannot doubt that in the view of a court of equity, it is unjust and unconscientious to attempt to enforce a judgment so obtained. We may further observe that if a sheriff make a false return either by collusion with a party, or mistake, a court of equity has an unquestionable jurisdiction to interpose, and give the appropriate relief; and to give effect to this remedy, the party injured should, of course, be permitted to aver against the truth of the return, and show it to be false, though it be matter of record." So in Hausworth v. Sullivan,[107] the court said: "A judgment pronounced without service of process, actual or constructive, and without a defendant's knowing that a court has been asked

106 7 Cranch, 332.

107 6 Mont. 203, 213, 9 Pac. 793.

to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs and proceedings are there provided to overthrow it, and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriated for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues, after full opportunity has been given to those who seek to sustain as well as to avoid the judgment. . . . . There seems to be but little dissent from the proposition that the want of service of process may be shown, in equity, in opposition to the statement as in the judgment-roll."

Judgments rendered against corporations, upon service made by mistake or fraudulent design, on persons supposed to be the proper officer to be served, have been considered proper subjects for equitable relief.[108] The fact that the want of jurisdiction does not appear of record, is at the present day, by a great preponderance of the authority, regarded as immaterial; nor does the affirmance on appeal of the judgment recovered without jurisdiction constitute any obstacle to jurisdiction in equity to relieve against it. The rule against collateral attack of the recitals of judicial records does not apply where the suit is in equity against a judgment void for want of service of process upon the defendant.[109]

108 Grand etc. Co. v. Schirmer, 64 Ill. 106; State etc. Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611; Chambers v. King Mfg. Co., 16 Kan. 270; Wagner v. Shank, 59 Md. 313; Southern etc. Co. v. Craft, 43 Miss. 508; Gulf etc. Co. v. Rawlins, 80 Tex. 579, 16 S. W. 430.

109 Lapham v. Campbell, 61 Cal. 296; Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548; Crofts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Bridgeport Sav. Bank v. Eldridge, 28 Conn. 556, 73 Am. Dec. 688; Owens v. Ranstead, 22 Ill. 161; Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49; Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216, 44 N. W. 675; Ridgway v. Bank of Tennessee, 11 Humph. 525; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193. In the first case here cited, the court, after stating the facts fully (a case of false proof of service of a defendant residing in another state), said: "The code has provided that remedy for relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc., § 473); or when taken in a case where

There is no important conflict in the decisions as to the existence and extent of the jurisdiction where the ostensible, but false proof of service appearing in the record consists of the affidavit of a private individual; and while in the case of a false return by a sheriff or other officer, there are respectable authorities, both early and recent, to the effect that a record containing it, and otherwise regular, is conclusive, yet the weight of authority is in favor of equitable jurisdiction to relieve against such judgments, as effectively as where the defect of jurisdiction consists in false proof of service by affidavit.[110]

summons has not been personally served on a defendant. In the first class of cases the remedy must be availed of within six month, and in the second, within a year, after rendition of judgment. But, independent of the provision of the code, I think that a court of record may, by virtue of its inherent power over its own records, so long as it has physical control of the same, set aside, on motion or otherwise, a judgment procured by fraud or such a judgment may be set aside by an original action in a court of equity, when by reason of the fraud, the court that rendered the judgment had not acquired jurisdiction of the person of the defendant. Truth, it is said, must be the basis of all judgments; and no court will knowingly allow itself to be abused. Before the codes the rule was that a decree gained by fraud might be set aside by petition, and a judgment at law by motion; and a fortiori might such decree or judgment be set aside by bill: Sheldon v. Fortescue, 3 P. Wms. 111; Richmond v. Tayleur, 8 P. Wms. 733; Lloyd v. Mansell, 2 P. Wms. 73. But it is urged that while the remedy by motion exists, and is available, the assistance of a court of equity cannot be invoked; nor can it be, after the right to the remedy has gone, by the expiration of the statutory time within which to avail of it, unless the party is not chargeable with neglect. This contention is made upon the principle that where a party has an adequate remedy at law he is not entitled to the assistance of a court of equity. But the converse of the proposition is also true, viz., that if a party has been deprived of his rights by a fraud, which was unknown to him at the time it was perpetrated, and for not knowing which he is not chargeable with negligence, and he has no remedy at law, a court of equity will grant him relief by an original action. If no laches, or want of diligence is imputable to a party, there is, says the supreme court in Bibend v. Kreutz, 20 Cal. 114, nothing in reason or propriety preventing the interference of equity."

110 See Dunklin v. Wilson, 64 Ala. 162; Ryan v. Boyd, 33 Ark. 778; State v. Hill, 50 Ark. 458, 8 S. W. 401; Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49; Hausworth v. Sullivan, 6 Mont. 203, 9 Pac. 798;

There appears to be no California case where relief was granted against a judgment, regular on its face and showing an officer's return alleged to be false. In Martin v. Parsons,[111] relief was granted principally because of the want of service on the defendant in the judgment against which relief was sought but there was in the case also an element of fraud by an interested court commissioner. The general rule is that, notwithstanding that fraud has been practiced in procuring the judgment, or that the judgment was obtained against the applicant without jurisdiction having been acquired, he will be denied any aid of equity unless he can show that had he been given the opportunity to defend in the action he would have prevented the recovery of the judgment, in whole or in part.[112] The reasoning in favor of this rule was well advanced in Gregory v. Ford,[113] as follows: "Can a defendant having no defense to an action, enjoin a judgment by default obtained on a return by the sheriff of service of process, upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity ac-

Ridgway v. Bank of Tennessee, 11 Humph. 523; Raymond v. Conger, 51 Tex. 536; Hamblen v. Knight, 60 Tex. 36. Cases of obtaining judgment by procuring false return of service of summons: Peck etc. Co. v. Pella etc. Co., 19 Colo. 222, 34 Pac. 988; Wilson v. Montgomery, 14 Smedes & M. 205.

111 49 Cal. 95.

112 Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Waldrom v. Waldrom, 76 Ala. 285; Burch v. West, 134 Ill. 258, 25 N. E. 658; Coon v. Jones, 10 Iowa, 151; Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; Jones v. Howell, 37 Neb. 320, 40 Am. St. Rep. 494, 55 N. W. 965; Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537; Crocker v. Allen, 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 102, 66 N. W. 115.

113 14 Cal. 138, 142, 73 Am. Dec. 639.

knowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff, for a false return, under such circumstances as to relieve him from the judgment and turn the plaintiff for redress to the sheriff."

In a few of the cases, it appeared that although the court had acquired jurisdiction of the person of the defendant, it lacked, or, after acquiring jurisdiction, lost jurisdiction of the subject matter of the action. In such cases relief has been freely granted in equity.[114]

§ 770. Further as to relief where no jurisdiction of the person.

Some attention has been given to the subject of this section under the general head of void judgments. But its importance warrants further consideration and again it may be stated upon a preponderance of authority that a judgment obtained against one without service on or appearance by, him, but though a false return of service on him, may be relieved against in equity. In Huntington v. Crouter,[115] the court, after citing and reviewing many authorities supporting its conclusion, said: "Many more decisions might be cited which support the doctrine that a court of equity has plenary powers, and ought, to enjoin a judgment at law based upon the false return of an officer, but the foregoing will serve to illustrate the wisdom of the more modern rule, which demonstrates that the action at law against the officer is too circuitous; and often inadequate; and, such being the case, the court committed no

114 Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031; Iowa etc. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122; Missouri etc. Co. v. Reid, 34 Kan. 410, 8 Pac. 846; Smith v. Pearce, 6 Baxt. 72; Chambers v. Hodges, 23 Tex. 104.

115 33 Or. 408, 413, 54 Pac. 208. To same effect, DuBois v. Clark, 12 Colo. App. 220; 55 Pac. 750. Where a default judgment in a justice's court, regular on its face, is sought to be set aside by contradicting the officer's return by evidence dehors the record, complainant has no adequate remedy at law, and is entitled to equitable relief: Meinert v. Harder, 39 Or. 609, 65 Pac. 1056.

error in permitting evidence to be introduced at the trial which tended to prove that plaintiff had not been served with the summons in the original action."

And where property was sold under a judgment obtained without jurisdiction of the person of the defendant, the fact that the purchaser had redeemed the property from a tax sale was held no defense to an action to set aside such judgment and proceedings.[116] Nor does a statute authorizing the court to relieve a party from a judgment taken against him through mistake and excusable neglect, or from a judgment without personal services of the summons, preclude a judgment debtor from enjoining the enforcement of a judgment void for want of service of the summons.[117]

§ 771. Relief granted for matters occurring after judgment.

It may occur that a judgment when recovered, was just and equitable, and yet, owing to circumstances arising after its recovery, it cannot be enforced without a violation of the equitable rights of the defendant. In such cases relief may be had by a resort to equity; by injunction or other adequate remedy. In Marks v. Willis,[118] the action was brought to enjoin the enforcement of an execution. The defendant in the equitable action had previously brought an action against the plaintiff to recover possession of personal property, praying a money judgment if delivery thereof could not be had. Subsequently an execution in regular form had been issued. In that action judgment was recovered as prayed, and an execution issued in the usual alternative form. Before the levy of an execution, the plaintiff (defendant in the legal action), tendered to the defendant the property sued for, together with all costs and disbursements taxed against him. But such tender was refused and a levy upon plaintiff's property was being threatened when the action in equity was brought. The trial court granted an injunction restraining the levy upon plaintiff's property, as prayed, and its decision was affirmed on appeal,

116 Keeley v. East Side Impv. Co. (Colo. App.), 65 Pac. 456. See, also, George v. Nowlan, 38 Or. 537, 64 Pac. 1.

117 Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824.

118 36 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526.

the court saying: "When, therefore, Marks tendered and offered to return the property within five days after the litigation had ended, and before any levy had been made under the writ, it operated as a satisfaction of the judgment, and thereafter no proceedings could legally be had for enforcing, by execution, the alternative judgment for money." In such cases the defendant in execution has the right to discharge the judgment by a return of the property within a reasonable time, and can be compelled to pay its adjudged value only in case a delivery cannot be had.[119]

§ 772. Bills of review.

Bills of review are clearly distinguishable from other applications in equity for relief against the final results of prior litigation. The bill of review was, from its origin, invariably directed against decrees in chancery, and exclusively performs that office, wherever it is in use, at the present day. But in all states where equitable and legal causes of action are triable in the same forum, former differences between decrees in equity and judgments at law have disappeared, or, to speak more correctly, are immaterial, the legal effect and instruction being the same. Of much greater importance is a study of the facts warranting any relief whatever against a judgment, and the kind of relief which it is proper to award upon the facts of each individual case. And yet, theoretically at least, the bill of review, and the action to enjoin or to obtain other relief against a judgment, are not interchangeable remedies; and where the decree or other decision against which relief was sought was entered in an equitable action, and the ground of relief was such that it might have been urged by bill of review, it was held that relief should have been sought in that form, in preference to an original action for an injunction.[120]

Whether if a party against whom a judgment has been entered in an equitable action in California could maintain a

119 Etchepare v. Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668; Meads v. Lasar, 92 Cal. 221, 28 Pac. 935; Carson v. Applegarth, 6 Nev. 187.

120 Smithson v. Smithson, 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300.

bill of review for errors of record, upon a showing which meets all the general requirements of such bills, and an additional showing that without his fault he has lost the remedy by appeal, appears not to have been directly decided. The rule that such bill will not be entertained, after the period within which an appeal might have been prosecuted, if strictly adhered to, would bar the remedy; but courts have, in some instances, disregarded that rule, to meet exceptional circumstances. It may at any rate be considered as settled that, in the absence of such showing, a bill, such as was known at common law, does not lie in California, for errors apparent of record. It was decided in San Francisco S. & L. Soc. v. Thompson,[121] where the court said: "The real ground of complaint, there is that the judgment is erroneous upon the face of the record. The mode prescribed by our Practice Act for correcting such errors is by appeal from the judgment, upon the judgment-roll alone. This is a simple and speedy mode of correcting the judgment, and it is the remedy provided." The foregoing may be considered the only case in which a bill which contained the elements of a bill of review has come before the supreme court, notwithstanding the fact, that the complaint in Steen v. March[122] was so designated. In that case, it was stated that the rule of limitation upon bills of review, namely, that they will not lie after the time for taking an appeal, is not statutory, but is adopted by analogy to the statute governing appeals. Such rule is, therefore, not arbitrary and inflexible.

It seems that the bill of review has a limited place in the Idaho practice. In a recent case the supreme court of that state said: "Under our code the cases in which a bill of review will lie are very limited. In order to secure a new trial of a case determined in another action by bill of review, the plaintiff must show, by his complaint, a good cause, or ground, for granting him a new trial in the action; that time for applying for the relief under the provisions relating to new trials, or to have the judgment set aside on the ground of mistake, surprise, or excusable neglect, has expired; that the party could not obtain the relief by appeal; that he has been

121 34 Cal. 76.

122 132 Cal. 616, 64 Pac. 119.

guilty of no laches or blunders in protecting his rights; and that by reason of fraud, mistake, or surprise, over which he had no control, he is entitled to a new trial, which only by the interposition of equity, he can obtain, or could have obtained by the exercise of reasonable diligence."[123]

§ 773. Parties to the action.

There is no limit with respect to the classes of judgments subject to be affected by the exercise of the jurisdiction, except that, since it cannot operate directly against the judgment itself, it is required that there be persons interested in its enforcement of whom the court of equity can acquire jurisdiction. It could accomplish nothing in the case of a judgment already fully executed, and under which the status of parties with reference to the matters litigated in the action had become permanently fixed. So long, however, as the rights of the litigants have not been completely adjusted, they may be made parties to the equitable action, and subjected to such order and decree as the court sees fit to make, conformably to the equities of the case and practice of the court. Where the judgment is of such character as that by its terms, upon being entered, to fix beyond recall the status of the parties, there being no question of jurisdiction, there is no place therein for the exercise of equitable jurisdiction; for instance, in divorce cases, where no property interests are involved. This principle is applied to the probate of wills; and it is now a well settled rule that courts of equity will not interfere with decrees of courts exercising probate jurisdiction establishing wills, and admitting them to probate.[124] And, although it be alleged in a bill brought by those alleging themselves to be the heirs, or that there is a later will, or that there is another and a genuine will, the one admitted being forged, equity will not

123 McMillan v. Wooley (Idaho), 51 Pac. 1029. A bill of review, when based on newly discovered facts, must contain averments making it appear that such facts could not have been known by those presenting it, by their exercising reasonable dilgence in time for the former trial: Warren v. Adams, 26 Colo. 404, 60 Pac. 632.

124 See ante, § 762.

entertain such bill, but will remit the parties to any remedies they may have in the court of probate jurisdiction.[125]

The general rule is that relief will only be given to the parties to the action in which the judgment was recovered or to persons whose rights are directly affected by it.[126]

The issues between one whose property has been sold under a void judgment and the purchaser at such sale, in an equitable action to set the sale aside are collateral to the subject now under consideration, and hence cannot be discussed in detail. The general proposition may be stated, however, that purchasers at execution sale, pursuant to a judgment rendered without jurisdiction of person of defendant, acquire title, if without notice of the infirmity.[127] Another important question relates to the rights in courts of equity of persons not parties to the original suit, seeking a remedy against fraud practiced upon their grantors, by which the judgment was obtained, under which they have acquired a title, or an interest; and as a rule such persons have no standing.[128]

125 State v. McGlynn, 20 Cal. 234, 81 Am. Dec. 118; Kearney v. Kearney, 72 Cal. 594, 15 Pac. 769, applying rule to order setting apart homestead; Goldtree v. McAllister, 86 Cal. 102, 24 Pac. 801, as to admission of will on foreign probate; Curtis v. Underwood, 101 Cal. 670, 36 Pac. 110, as to validity of notice to heirs; Langdon v. Blackburn, 109 Cal. 25, 41 Pac. 814; In re Broderick's Will, 21 Wall, 514; Gaines v. Chew, 2 How. 645; Colton v. Ross, 2 Paige, 396; Woodruff v. Taylor, 20 Vt. 65, 22 Am. Dec. 648; Brown v. Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

126 Myers v. Woodall, 35 Tex. 687; Marriner v. Smith, 27 Cal. 649.

127 Reeve v. Kennedy, 43 Cal. 643. See, also, McCauley v. Fulton, 44 Cal. 361, holding that upon collateral attack recitals in the judgment of service upon the defendants are conclusive of the question of jurisdiction of the person when rendered by a court of competent jurisdiction. To same effect, Jones v. Gillis, 45 Cal. 543; Stokes v. Geddes, 46 Cal. 19; Kelley v. Desmond, 63 Cal. 519, holding that proof of the execution of a deed and of the judgment and execution are sufficient for recovery in ejectment against the debtor; Rousch v. Fort, 2 Mont. 485, holding that the sale of real property under execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of bona fide purchasers.

128 See Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624, where the whole subject is learnedly discussed by Garoutte, J., and the authorities reviewed.

§ 774. Allegations must be specific.

Since a meritorious cause of action or defense must be shown, and can only be shown by setting forth the facts constituting it, that part of the bill should receive particular attention. Courts usually require a complete disclosure of the facts in the bill, to enable them to judge therefrom whether or not the cause of action or defense of which the applicant alleges himself to have been deprived was in fact meritorious.[129]

It is not necessary to set forth the evidence, but the probative facts, unless they be identical with the ultimate facts, should be pleaded. Whatever of the issues and history in the former action are necessary to make such allegations intelligible, should also be stated in connection with them. The same rule of pleading would apply where relief is sought on the ground of the loss, through accident, or other unavoidable cause, of the right to be heard on a motion for a new trial; and in such case sufficient of the facts should be set forth, either in the complaint or by reference to exhibits attached thereto, to show that, aside from the matter which prevented the hearing, the applicant should be granted a new trial.[130]

Where the application for relief is grounded upon fraud, the ordinary requirements as to allegations of fraud are applicable. In a case of this kind, the court said: "There is, therefore, nothing in the facts alleged to sustain the general averments of a fraudulent purpose in the manner of procuring the decree; and such general averments, standing alone and unaccompanied by facts which in themselves disclose fraud, are insufficient to give the transaction even a colorable aspect of that nature. Such general averments are to be regarded as merely the conclusions of the pleader, embracing no issuable character and not the averment of substantial facts, which are admitted by the demurrer."[131]

129 Whitehill v. Butler, 51 Ark. 341, 11 S. W. 477; Johnson v. Branch, 48 Ark. 535; 3 S. W. 819; Jeffery v. Fitch, 46 Conn. 601; Winters v. Means, 25 Neb. 241, 13 Am. St. Rep. 489, 41 N. W. 157.

130 See Kansas City etc. Ry. Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960, where the whole record was presented including an unsettled bill of exceptions.

131 Heller v. Dyerville Mfg. Co., 116 Cal. 127, 134, 47 Pac. 1016.

A lack of diligence is fairly imputable to a party who has suffered judgment to go against him without availing himself of subsisting defenses to the action, nothing more appearing. Therefore, it is necessary that he fully present to a court of equity, not only the existence and nature of such defense, but some equitably sufficient reason for not resorting to it, or making it effective in the action wherein the judgment was recovered.[132] And where ignorance of the existence of a defense, until too late to make it available, is claimed, such claim will be looked upon with suspicion, and will not be accepted, unless the circumstances, being stated, show the probability of its truth.[133]

See, also, Davis v. Chalfant, 81 Cal. 627, 22 Pac. 972; Harris v. Taylor, 15 Cal. 349; Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 363; Sacramento Sav. Bank v. Hynes, 50 Cal. 202; Peterson v. Hewitt, 79 Cal. 598, 21 Pac. 950; Van Weel v. Winston, 115 U. S. 237, 6 Sup. Ct. Rep. 22; Fogg v. Blair, 139 U. S. 127, 11 Sup. Ct. Rep. 476.

132 Menifee v. Myers, 33 Tex. 690; Jevne v. Osgood, 57 Ill. 340; Simmons v. Martin, 53 Ga. 620.

133 George v. Alexander, 6 Cold. 641; Garrett v. Lynch, 45 Ala. 211.

INDEX.

[The figures refer to sections.]

ABANDONMENT.
of proceeding for new trial, what constitutes, 382
proper practice upon, 382.
showing of, at hearing, 383.
of opposition to proceeding to settle statement, not presumed, 424.
See Hearing and Disposal of Motion.

ACCIDENT AND NECESSITY.
separations of jury caused by, constitute exceptions to rule, 153.

ACCIDENT OR SURPRISE.
as ground for new trial, 182-203.
new trial for, and relief from excusable neglect, compared, 182, 183.
new trial for, and relief as for excusable neglect, distinguished, 183.
statutory provisions governing, 182.
not ground for new trial in criminal cases, in California, 182.
though terms used as synonymous, not correctly so used, 183.
absence of attorney as affecting, 184.
analogy, interdependence and concurrence between, and other grounds of relief, 185.
distinguished from and compared with newly discovered evidence as ground for new trial, 185.
and newly discovered evidence, as joint grounds for new trial, 185.
motion on ground of, looked upon with disfavor, 186.
discretion where motion based upon, 187.
not usually predicable upon court's ruling; exceptions, 188.
proof of special property in replevin suit does not constitute, 189.
none, in criminal case by introduction of proof indicated at preliminary examination, 189.
none, where investigation at trial reasonably to be expected, 189.
none, as to evidence indicated by pleadings, 189.
new trial not granted for, without showing of diligence, 190.
waiver of, by failure to make timely application to court, 190, 191.
cannot be predicated upon absence of witnesses without showing of diligence, 190.
cannot be predicated upon disappointment at proof offered by opposite party, 190.

[The figures refer to sections.]

ACCIDENT OR SURPRISE—Continued.
cannot be predicated upon supposed weakness of case for opposite party, 190.
waiver of, by failure to apply for continuance, 191.
continuance to avoid effect of, when excused, 192.
cannot be predicated upon oversight or forgetfulness, 193.
no new trial for, unless different result upon retrial probable, 194.
act of court amounting to, 195.
can rarely be predicated upon misconduct or neglect of party's own counsel, 197.
may be predicated upon misconduct of party's own counsel, when, 197.
abandonment, without notice, of party's own counsel, 197.
consisting in change of ruling by court, 188.
overruling of prior decision by supreme court, 188.
in unexpected evidence, 191.
disappointment at testimony of witness, 191.
consisting in trial, upon mistaken theory of both sides, 198.
inability to attend trial, 199.
taking up trial out of order and without notice, 199.
unexpected failure of witnesses to attend, 200.
deciding case during preparation of affidavits for continuance, 195.
violation of agreement, 196.
misleading information from counsel for adverse party, 196.
trial of case without notice, 195.
expected testimony of party's own witness, 201.
unexpected testimony from adverse party, usually connected with misleading conduct, 202.
witness giving testimony different from that given at former trial, 202.
unexpected testimony of opposite party, 202.
essentials of affidavits on motion based upon, 203.

ACTIONS.
equitable, new trials granted in, as in legal, 21.

ADDRESS.
notice of intention should contain, 371.

ADJOURNMENT OF TERM.
effect of, upon pending proceeding for new trial, 26, 403.

ADMINISTRATOR. See AMENDMENT; Fiduciary Relation; Stay Bond.

ADMISSION.
of evidence set forth in affidavit must be as broad as offer, 143.
in pleading, as effective to prevent review as stipulation, 676.

[The figures refer to sections.]

ADMONITION OF JURY.
joining of counsel in, as care of irregularity, 92.

ADVERSE PARTY.
wrongful intent of, not necessary in case of irregularity of, 80.
responsible for irregularity, of persons closely related to, 80.
conversation between, and juror, as irregularity, 85.
who is, for purposes of appeal, considered, 536-538.

AFFIDAVITS.
to obtain continuance, requisites of generally, 133.
for absent evidence must show inability to otherwise prove, 133, 135.
for absent evidence, must show materiality of same, 133, 134.
for absent evidence, generally as to diligence, 133, 136.
for absent witness, must show resort to legal process, 136, 137.
advertence, 136.
resort to legal process, how shown in, 137.
must show more than mere delivery of subpoena to officer, 138.
showing in, where deposition of absent witness not taken, 139.
where facts stated in upon information or belief, sources thereof must be stated, 140.
must show probability of procuring absent testimony in future, 140.
requisites of, where no terms of court, 141.
where failure to procure issuance of attachment must be explained in, 137.
charging misconduct of jury, must be specific, direct and positive, 181.
not sufficient if merely upon information and belief, 181.
essentials of, 181.
setting up accident or surprise, essentials of, 203.
discretion where conflicting, 187.
must state facts showing probability of different result upon retrial, 194, 203.
in support of motion based upon accident or surprise, must fully set forth the facts expected to be proved, 203.
must present best available evidence, 203.
of what corporate officers required, where newly discovered evidence alleged, 207.
setting up newly discovered evidence, must show its materiality, 220.
must show probability of a different result, 221.
must show its competency, 224.

[The figures refer to sections.]

AFFIDAVITS—Continued.
not sufficient if merely impeaching, 227.
should fully set forth new evidence, 229.
should show diligence, 229.
of both party and counsel required, 229.
should, if possible, be accompanied by affidavits of any new witnesses, 203.
requisites of principal, where motion based upon newly discovered evidence, 229.
of witnesses, upon motion based upon newly discovered evidence, 230.
use of upon motion to dismiss proceeding for new trial, 382.
striking from files, a practice condemned by higher courts, 384.
failure to file in time, how taken advantage of, 384.
power of court to extend time for filing, 387.
considered at hearing in connection with record, 390.
when given credence in preference to statement of judge, 390.
matters considered in connection with, at hearing of motion, 391.
when substantive ground for new trial must be shown by, 391.
as evidence at hearing of motion, rules governing, 406.
of jurors to impeach verdict, rule as to, 409.
and exhibits, incorporation of, in statement or bill, 460.
uses of, in support of certain grounds, rather than of statement, 424.
connected use of, and statement or bill, 461.
of justification, at execution of bond an essential formality, 570.
used on motion for new trial made on minutes, identification of, on appeal, 631.
not available for purposes of amending transcript, 644.
use of, at hearing of motion to dismiss appeal, 667.
when received to show that appeal frivolous, 722.

AGREED STATEMENT.
may take place of findings, 604.

ALIBI.
test of sufficiency of evidence in support of, 243.

AMENDMENT.
orders and rulings relating to, as grounds for new trial, 103-122.
of findings, not permissible after entry of judgment or decree, 608.
of defective verdict, how made, 78.
when action of court pertaining to, to be specified as error, 438.
of answer, abuse of discretion in refusing application for, 104.
two methods of review of action of court upon, 104.
of answer, error in refusing to allow, 104.
what constitutes, 104, note.

[The figures refer to sections.]

AMENDMENT—Continued.
of pleadings, statutory provisions pertaining to, 105.
usually permitted upon sustaining demurrer, 106.
upon sustaining demurrer, proper practice, 108.
large discretion of trial court, pertaining to, 107.
abuse of discretion, pertaining to, 107.
general limitations upon right of, 108.
cause of action cannot be wholly changed by, 108.
cause cannot be changed from action ex contractu to one ex delicto by, 108.
cause cannot be changed from action ex delicto to one ex-contractu by, 108.
action in representative, cannot be changed to one in individual, capacity by, 108.
action against party in representative, cannot be changed to one against, in individual, capacity by, 108.
different character of relief may be sought by, 108.
distinction between changing cause of action and changing remedy by, 109.
not allowed to cover new facts arising pending action, 110.
objection to, for bringing in facts, arising, pending action, how waived, 110.
not permitted in aid of unconscionable demands, 113.
to set up statute of limitations by; but within discretion of trial court, 113.
not permitted, where would give unfair advantage, 114.
not permitted to change sworn admission into denial, 114.
when not admitted for purpose of setting up estoppel at trial, 114.
propriety of allowing, largely dependent upon their character, 115.
diligence required in proposing, 115.
how far right of dependent upon stage of proceedings at which proposed, 116.
relative convenience and inconvenience of parties considered, 116.
imposition of conditions to leave for, 116.
at trial, to conform to proofs, must conform thereto, 117.
at trial, when should be permitted, 117.
after judgment only permissible as to formal matters, 118.
in special proceedings, governed by general rules, 119.
in probate, governed by general rules, 119.
imposition of terms upon allowance of, 121.
right to object to, how waived, 122.
necessitating continuance, 142.
of answers, liberality in permitting, 107, 112.

[The figures refer to sections.]

AMENDMENT—Continued.
of answers, proper limitations, upon right of, 112.
of prayer, permissible, 120.
of notice of intention, what, and when permissible, 376.
of statements and bill, as to whether right of, extends to supplying omitted specifications; compare, 433, 446.
includes right to insert new specifications, 446.
extensive powers of courts pertaining to, 446.
proceedings pertaining to, 452.
of complaint, effect of upon question of appellate jurisdiction, 467.
of clerk's certificate, to transcript permitted in supreme court, with reference to undertaking, 545.
power of, by lower court, suspended, pending appeal, 559.
of verdict by court, for clerical defects and omissions, 584.
of uncertain, informal and defective verdict, 585.
of findings, power of court with reference to, 608.
of record in appellate court, 729.

ANCILLARY PROCESS AND AUXILIARY PROCEEDINGS.
relation to of pending motion for new trial, 419.

APPEALS.
judgments as subject of, 479-495.
orders generally as subjects of, 496-510.
orders in probate as subjects of, 511-516.
special orders made after final judgment, as subjects of, 517-521.
orders on motion for new trial as subjects of, 501, 512.
from judgment, only lies from final, 479, 480.
pendency of, from order on motion does not extend time for appeal from judgment, 417.
when lies, from order made at settlement of statement or bill, 456.
from justice's court, new trial upon, in courts of record, 21.
right of, not affected by nonappearance of parties, 745.
allowed from special orders made after final judgment without distinction, 622.
from order dissolving injunction, has no effect to revise order granting, 562.
effect of upon lieu of judgment, 565.
attachment lien, 566.
motion to set aside judgment, 562.
stays operation of mandatory injunction, 562.
waiver of right of, as ground for dismissal, 652.
by whom may be taken in criminal case, 737.

ARGUMENT.
nonobservance of proper order of, as ground for new trial, 41.
improper line of, amounting to irregularity of adverse party, 90.

[The figures refer to sections.]

ARGUMENT—Continued.
abuse of privilege in, amounting to irregularity of adverse party, 90.
considerable latitude of conceded to counsel, 90.
improper, new trial not granted for, where verdict only one possible, 90.
upon matters disposed of in case before trial, improper, 90.
comment during, upon failure of defendant to testify in criminal case, as irregularity, 91.
nondiscernable properties of exhibits not to be referred to during, 92.
stating facts untruly during, as irregularity, 92.
as to effect of evidence not improper, 92.
when improper, no answer to irregularity of, that other counsel likewise at fault, 92.
shifting of burden of, on appeal, 672.
oral, in appellate court, practice governing 696.
See Irregularity of Adverse Party.

ARIZONA.
grounds for new trial in, 23, note.

ARRAIGNMENT.
not waived by proceeding for new trial, 422.

ARREST OF JUDGMENT.
motion in, when proper, 10.
motion in, and for new trial, relations between, 10.
new trial distinguished from, 10.

AUTHENTICATION.
of statement or bill, requirements as to, 442.
of transcript, 636, 637.
not conclusive, 637.

BANKRUPTCY PROCEEDINGS.
have no effect upon appellate proceeding, 707.

BAILIFF.
misconduct of, in communicating with jury, 61.

BIAS.
importance of, as a ground of challenge, both at common law and under statutes, 63.
as common law and constitutional disqualification of juror, 69.
statutory definitions of, 67.
implied, statutes defining and validity of such statutes, 67.
concealed, remedy for, divergent rules in various states, 68.
of juror, statutory limitations of right to challenge for, 257.
common-law principles as to, compared with statutory provisions, 257.

[The figures refer to sections.]

BIAS—Continued.
consisting in having formed or expressed opinion, 257.
of proposed jurors, subject of extended controversies, 63.
statutes prescribing evidence amounting to proof of, 67.
not a ground for challenge to panel, 258.
of court evident in argumentative instruction, 317.
See Errors in Impaneling Jury; Irregularity of Jury.

BILLS OF EXCEPTIONS.
and statement, compared, 629.
and statements on appeal discussion of, 612-621.
differentiated from statements with respect to specifications, 433.
what specifications required in, 619.
similarity in preparation and uses of, to statements, 423.
are part of judgment-roll, 621.
methods of preparation and uses of, 613.
relation of, to statements on appeal, 613.
statutory changes pertaining to, 613.
one of two prescribed methods for settlement of, must be pursued, 617.
use of, permissible in review of decision upon questions of law, 618.
method of settlng, at trial explained, 614, 615.
uses of, for review of orders, on appeal, 614, 615.
method of settling during trial, 613.
settled at trial, seldom used, 613.
settled after trial, preparations and uses of, 616.
important functions of, as part of record on appeal, 612.
unknown to practice under former Practice Act, 623.
on appeal from order, now sanctioned and required by rule of court, 624.
on appeal from order, time for service of, 426.
on appeal from order, may contain parts of judgment-roll, 432.
when required to set forth proceedings subsequent to order on motion for new trial, 632.
appeal from order, will in proper case for use of, be disregarded without, 624.
on appeal from order, proper time, place and practice for settlement of, 625.
use of purposes of identification, 626.
not required where no purpose accomplished by, 624.
need not embrace parts of judgment-roll, 624.
on appeals from special orders and orders on motion for new trial statutory provisions providing for, 626.
in criminal cases, essentials of, 738.
statutes and rules governing, in criminal cases, 739.

[The figures refer to sections.]

BILLS OF EXCEPTIONS—Continued.
in criminal cases, statutes pertaining to settlement of, directory merely, 739.
additional, on appeal from order, when necessary, 628.
See Statements and Bills of Exceptions.

BILLS OF REVIEW.
considered, 772.

BREACH OF CONTRACT.
excessive damages not proper ground for new trial in action for, 247.

BURDEN.
shifting of, where motion grounded upon irregularity, 36.

BURDEN OF ARGUMENT.
when shifts to respondent, 698.

BURDEN OF PROOF.
shifting of, in cases of separation of jury, 152.
at hearing of motion, when shifts to opposition, 406.
shifting of, at hearing of motion to dismiss appeal, 667.

CALIFORNIA.
grounds for new trial in, 23, note.

CHALLENGES.
right of, for cause, the same under statutes as at common law, 63.
of jurors propter delictum, 64.
propter affectum, 64.
statutory and common law, comparison of, 64.
California code provisions relating to, 64.
to the panel distinguished from challenges to single juror, 258.
when must be interposed, 64.
right of, may be exercised at any time before jury sworn, 263.
peremptory, purely statutory, 63.
right to full panel before exercising, 263.
party restored to right of, upon discharge of juror for sickness, 57.
failure to exhaust, when without prejudice, 73.
duty of party to exhaust, as basis for alleging error, 262.
to grand jury, not usually available as irregularity, 64.
to the array, of grand and petit jurors, 64.
failure to advise accused without counsel, of rights pertaining to, as irregularity, 56.
for cause, trial of must be by court, 64.
triers of, at common law, 63.

CHANCE VERDICT.
defined, 178.

[The figures refer to sections.]

CIRCUMSTANCES.
surrounding intercourse between party and juror, importance of, 88.

COERCION.
urging jury to agree amounting to, as irregularity, 46.

COMMON LAW.
principles of, defining right to jury trial, still in force, 63.
resorted to for definition of right to jury trial, 65.
of offenses at, wherein jury trial of right, 66.

COMPLAINT.
in action for equitable relief against judgment, essentials of, 774.
in action for relief against judgment must be specific, 774.

COMPROMISE.
by jurors in reaching verdict does not constitute misconduct, 180.

COMMUNICATIONS.
between court and jury as irregularity, 44.

CONCLUSIONS OF LAW.
requirements as to, and rules governing, 610, 611.
how should be stated, 610.
little importance of, 610.
no limit upon power to change, 611.
are superseded by entry of judgment, 611.
erroneous, no ground for motion for new trial, 8.
distinguished from statements of ultimate fact, 597.
erroneous, procedure for correction of, 8.
correction of, distinguished from new trial, 8.

CONDEMNATION PROCEEDINGS.
new trial for review of decision in, 21.

CONDITIONAL ORDERS. See Orders.

CONDITIONS.
imposition of, upon granting continuance, 146.
to granting continuance, none can be imposed, where showing of legal right to continuance, 146.
imposition of, upon allowing amendments to pleadings, 121.

CONDUCT.
calculated to influence jurors, as irregularity of adverse party, 88.

CONFLICT OF EVIDENCE.
in order to limit review, must be substantial, 678.
See Scope of Inquiry and Rules of Decision on Appeal.

[The figures refer to sections.]

CONSENT.
effect of, in cases of unauthorized separation of jury, 154.
review not limited by, where defect fatal, 676.
limitation by, upon scope of review, 676.
may be so given as to amount to a virtual protest, 677.

CONTINUANCES.
granting and refusing, 123-146.
diligence required in applying for, 216.
grounds for not available at hearing of motion for new trial in absence of application for, at trial, 388.
absence of party as ground for, 128.
for absence of party, statutes governing, 128.
business engagements of party as ground for, 129.
not granted on account of business engagement of party, except in cases of extreme urgency, 129.
absence of counsel as ground for, 130.
other engagements of counsel as ground for, 130.
on account of other case involving same subject matter, 142.
rendered necessary by amendment of pleadings, 142.
change of counsel as ground for, 132.
absence of counsel as member of legislature as ground for, 131.
absence of witness as ground for, 133.
the usual remedy for absence of witnesses, 200.
not easily obtained where evidence in applicant's possession, 136.
miscellaneous grounds for, 142.
application for carefully scrutinized, 124.
court has discretion to grant at any stage of case, 125.
not granted at close of trial without strong showing, 125.
right to, notwithstanding right to take deposition, 126.
as of right, where issue not joined, 127.
application for, when necessary to avoid imputation of waiver, 185.
neglect to apply for as answer to motion where evidence discovered before or at trial, 207.
application for, in case of surprise by unexpected testimony, 201.
failure to apply for, may bar new trial for accident or surprise, 183, 184.
where application for, excused, 192.
how and when avoided by admission of opposite party, 143.
not avoided of right by admission of prosecuting attorney, in criminal case, 143.
admission to avoid, must be as broad as proffered testimony, 143.
having presented cause for, party not bound to submit to test of good faith, 144.
when application for excused, motion being based upon newly discovered evidence or accident and surprise, 185, 200.

[The figures refer to sections.]

CONTINUANCES—Continued.
action of court upon application for, as abuse of discretion, 123.
when refusal to grant error, 123, 126.
two methods of review of order refusing, 123.
requisites of affidavit for, generally, 133.
rules governing applicable to special proceedings, 145.
of special proceeding, statutes affecting right of, 145.
imposing conditions upon granting, 146.
of criminal case, cannot be conditional, 146.

COSTS.
appealability of orders pertaining to, 519, 520.
allowance of, upon appeal, 723.
of appeal, method of collecting usually prescribed by statutes, 723.

COUNSEL.
ignorance of, of law, cannot constitute accident or surprise, 188.
change of, as ground for continuance, 132.
deception and violation of agreements by, amounting to surprise, 196.
negligence of, imputable to client, 190.
party's own, fraud and colusion of, amounting to surprise, 197.

COUNTER-AFFIDAVITS.
use of, when newly discovered evidence relied upon, 229.
limiting consideration of, on question of newly discovered evidence, 409.
time for filing, controlled by court, 384.
See Evidence, Hearing and Disposal of; Motion for New Trial.

COUNTERCLAIM.
opportunity to bring forward, no ground for new trial, 5.
effect of, upon question of appellate jurisdiction, 467.

COURT.
irregularities in the proceedings of, discussed, 32-62.
time and place of holding, as subject of irregularity, 38.
terms of, in connection with irregularity in holding, 38.
motion must be made in that, where trial was had, 7.
parties, their attorneys and jurors, belong to autonomy of, 33.
irregularity of, in holding sessions at unreasonable hours, 38.
consisting in expression of undue solicitude for early agreement of jury, 46.
in refusing to compel election between counts, 54.
misconduct of, in commenting upon testimony and witnesses, during trial, 49.
in animadverting upon conduct of counsel, 48.
trial, province of, where evidence conflicting, seldom invaded, 237.

[The figures refer to sections.]

COURT—Continued.
power of to extend time for giving notice of intention, 364.
reasons of, in passing upon motion, immaterial, 238.
opinion of, not to be substituted for that of jury, 231.
act of, constituting surprise, 195.
change in ruling of, constituting accident or surprise, 188.
See Irregularity of Court; Rules of Court.

CREDIBILITY OF WITNESSES.
as affecting question of sufficiency of evidence, 243.
See Scope of Inquiry and Decision on Appeal; Witnesses.

CRIMINAL CASES.
newly discovered evidence, as ground for new trial in, 205.
showing of materiality of new evidence in, 220.
rule in, requiring affidavits of witnesses to accompany application based upon new evidence, 230.
relaxations of rule requiring diligence in, 219.
no accident or surprise in, by offer of proof drawn out upon preliminary examination, 189.
accident or surprise no ground for new trial in, in California, 182.
qualifications, and grounds for challenge of jurors in, in California, 64.
importance of voir dire examination of jurors in, 256.
what, within constitutional guaranty, 66.
no comment in, upon failure of defendant to testify permissible, 91.
requirements as to correct instructions stricter in, than in civil cases, 315, 322.
instructions need not be excepted to in, 330.
code provisions as to instructions in, 310.
governed by same general principles as civil, with reference to separations of jury, 152.
separation of jury in, statutes relating to, 150.
unauthorized separation and dispersion of jury in, usually fatal to verdict, 151.
statutes relating to separation of jury after final retirement in, 151.
absence of defendant at trial of, as irregularity, 55.
failure to advise accused having no counsel, as to right to challenge, as irregularity in, 56.
sealed verdict not authorized in, 154.
irregularity in handing indictments to jury in, 162.
discretion as to order of proof somewhat narrowed in, 270.
misconduct in, of jurors imparting knowledge to fellow-jurors, 168, 169.
reaching verdict by chance in, a species of misconduct, 178.

[The figures refer to sections.]

CRIMINAL CASES—Continued.
reading public prints as constituting misconduct of jury in, 173.
unauthorized inspection of premises by jury in, usually presumed to be prejudicial, 158.
court cannot impose conditions to granting continuances in, 146.
continuance in, not avoided of right by admission of prosecuting attorney, 143.
absence of counsel as member of legislature no ground for continuance in, 131.
statutory provisions for taking depositions in, 139.
new trial for insufficiency of evidence in, 236.
question of weight of evidence seldom considered in, 239.
verdict may be set aside in, if contrary to weight of evidence, 236.
test of sufficiency of evidence in, 239.
evidence in, must remove reasonable doubt, 239.
test of sufficiency of evidence in, to prove alibi, 243.
large discretionary power of trial courts in, where insufficiency of evidence alleged, 237.
discussion of peculiarities of appeals in, 735-743.
statutory provisions governing civil cases, generally applicable on appeals in, 735.
constitutional and statutory provisions governing on appeals in, 736.
appeals in, purely statutory, 736.
appellate jurisdiction of, 736.
appeals in, may be taken by either side, 737.
record on appeal in, 738.
presumptions arising upon record in, 734.
rules governing bills of exceptions in, 739.
effect of reversal in, upon appeal by defendant, 743.
disposal of, on appeal, 742.
jurisdictional questions in, first disposed of, 742.
statutory provisions fixing time for appealing in, 532.
who may give notice of appeal in, 535.
scope of inquiry, and rule of decision in, same as in civil cases, 742.

CRITICISM.
of lower court, legitimate, distinguished from intemperate, 701.
legitimate, should not be forbidden, 701.
See Irregularity of Court.

CROSS-EXAMINATION.
irregularity in denying and limiting right of, 50.
proper, of defendant in criminal case, 91.

[The figures refer to sections.]

CUMULATIVE EVIDENCE.
term, a judicial invention, 225.
misleading definitions of, 225.
inharmonious decisions referring to, 226.
See Newly Discovered Evidence.

DAMAGE CASES.
conditional orders in, frequently made, 404.

DAMAGES.
usually, two grounds for motion in actions for, 247.
nominal, new trial not granted to enable party to recover, 249.
where alleged to be excessive, how question tested, 247.
inadequacy of, as ground for new trial, 247.
question of, sufficiency of evidence in actions for, discussed, 247.
exemplary, jury exclusive judge of amount of, within proper limits, 231.
order on motion may limit retrial to question of, 396.
allowance of, in case of frivolous appeal, mere delay not sufficient, 721.
upon dismissal of appeal, 722.
See Excessive Damages.

DECISION.
must precede proceeding for new trial, 2.
must, to warrant proceeding for new trial, be upon issue of fact, 3.
dispose of all issues, as to all parties, 2.
taking voluntary nonsuit with leave to move to set same aside constitutes, 361.
what constitutes, in case of waiver of findings, 361.
in equity cases, 361.
in probate cases, 361.
power of court to set aside, to receive evidence, 268.
constitutional provision governing form of, and manner of rendering, 703.
on appeal, forms of, 703.

DECREE. See Judgment.

DEFAULT.
no new trial in case of, 3.
See Scope of Inquiry and Decision on Appeal.

DEFENSE.
cannot be divided up and presented piecemeal, 211.

DEFINITIONS.
of chance verdict, and "quotient" verdict, 178, 179.
of cumulative evidence, 204, 225.

[The figures refer to sections.]

DEFINITIONS—Continued.
of decision, 2.
of exception, 300.
of "final judgment," 479, 480.
of irregularity, 33.
of jurisdiction in constitutions are limitations upon, jurisdiction, 462.
of misconduct of jury, 147.
of new trial, 1.
of newly discovered evidence, 204.
of order, 488, 496.
of remittitur, 733.
of right of trial by jury, under constitutions, 65.
of special cases, or proceedings, 477.
of special order after final judgment, 517.
of term "verdict or other decision against law," 250.
of terms "accident" and "surprise" as used in statute, 183.

DEMURRER.
error in rulings upon, no ground for new trial, 6.
See Scope of Inquiry and Decision on Appeal.

DEPOSIT.
in lieu of undertaking on appeal, requirements as to, 547.
cannot be withdrawn, 547.

DEPOSITIONS.
arrival of, during trial, not subject of newly discovered evidence, 207.
duty of party to have taken, to obviate continuance, 139.
failure of opposite party to read, cannot constitute surprise, 190.
not to be segregated and read in parts, 292.
reading, in absence of accused, as irregularity, 55.
statutory provisions for taking, in criminal cases, 139.
that party may take and use, when no answer to application for continuance, 126.
use of, at hearing of motion, 410.
proper method of taking, for use upon motion, 410.
when general objection to reading of, sufficient, 288.

DIFFERENT RESULT.
probability of, must be shown in case of motion based on accident or surprise, 194.
probability of, in passing upon ground of irregularity, 36.

DILIGENCE.
required in ascertaining disqualification of jurors, 64, 76, 263.
to be shown to avoid implication of waiver of statutory disqualification, 69.
with reference to interviewing witnesses, 190, 218.

[The figures refer to sections.]

DILIGENCE—Continued.
in procuring attendance of witness, not shown by merely delivering subpoena to officer, 138.
in searching for lost papers, 218.
in compelling unwilling witness to answer, 190.
in examining and cross-examining witnesses, 214.
in interviewing and procuring attendance of witnesses, 213.
in procuring deposition of absent witness, 139.
in examining public records, searching for lost papers and introducing secondary evidence, 213.
in applying for continuance, 125.
in proposing amendments to pleadings, 115, 116.
to be shown where surprise predicated upon unexpected testimony, 201.
to be shown where motion based upon newly discovered evidence, 204, 207, 209.
to be shown in seeking relief from accident or surprise, 190, 191, 203.
in preparation to meet evidence from adverse party, 202.
in presenting ground relied upon in original action, as prerequisite to equitable relief from judgment, 759.
to be shown specifically, 218.
relaxations of rule as to, 209, 219.
showing of, where dispensed with in case of disqualified juror, 71.
in procuring settlement of statement, what constitutes, 426.
disbarment of attorney new trial not proper method for review of, 21.

DISCRETION.
of trial judge, extensive at common law, 19.
early attempts to limit, 20.
point at which exercise of, ends, and abuse begins, 20.
extent of, dependent somewhat upon the particular ground relied on, 22.
statutory procedure a curtailment of, 22.
at hearing and in disposal of motion, limitations upon, 397.
extensive, at hearing, in Oregon, 388.
with reference to introducing evidence, seldom interfered with, 265.
extends to setting aside submission and nonsuit to receive evidence, 267.
abuse of, with reference to order of proof, 265, 266.
as to order of proof, somewhat narrowed in criminal cases, 270.
with respect to allowing and limiting examination and cross-examination of witnesses, 269.
of trial court, large concession to, as to sufficiency of evidence, 238.

[The figures refer to sections.]

DISCRETION—Continued.
where insufficiency alleged, limits of, 237, 238.
of court, to permit separations of jury, under statutes, 59.
to allow exhibits to be taken to jury-room, 162.
with respect to sending out instructions and papers with jury, 45.
to mildly urge jury to agree, 46.
extensive, of trial court, where evidence conflicting, 237.
where motion based upon newly discovered evidence, 206.
where motion on ground of accident or surprise, 187.
to continue, in cases of amendment of pleadings, 142.
in granting postponements, liberally exercised for convenience of counsel, 124, 130.
abuse of, in refusing continuance, 126.
to show abuse of, in refusing continuance requires strong showing, 125.
proper exercise, and abuse of, with reference to amendments, 103-122.
wide latitude of, conceded to trial courts pertaining to amendments, 107, 117.
abuse of, the real grievance where application to amend addressed to, 104, 107.
abuse of, in refusing to permit amendment of answer, 104.
pertaining to amendments, none, when right given by statute, 107.
review of, on appeal, 22.
limitation of review by reason of concession to, 683.
as affecting scope of review, where mistake misapprehension etc., of jury, 679.
not extensive where error or that decision against law relied upon, 397.
to relieve from failure to file points and authorities, 654.
none, where direction of appellate court positive and clear, 719.
DISMISSAL.
of motion for new trial, various grounds for, and methods of, 336.
when in legal effect a denial, 382.
See Hearing and Disposal of Motion for New Trial.
DISMISSAL OF APPEAL.
discussion of, 646-669.
grounds for, mostly jurisdictional, 646.
general view of subject of, 646.
motion for, distinguished from taking exceptions, 657.
proper, for failure to comply with any statutory step in proceeding, 647.
upon motion for want of jurisdiction, usually a mere convenience, 646.

[The figures refer to sections.]

DISMISSAL OF APPEAL—Continued.
where point jurisdictional, manner of calling attention of court to, immaterial, 656.
for want of jurisdiction of subject, 647.
for want of jurisdiction of parties, 648.
for failure to serve notice of appeal upon all entitled thereto, 648.
for prematurely taking appeal, 653.
for accepting settlement of matter in issue, 652.
for failure of appellant to file points and authorities, 654.
for waiver of right of appeal, 652.
for failure to file or serve transcript, 649.
for defectiveness of transcript, 650.
for failure to properly index transcript, 655.
from judgment entered by direction of appellate court, 655.
because second appeal from same order or judgment, 655.
from order on motion for new trial, in case where new trial cannot be granted, 655.
miscellaneous grounds for, 655.
transfer of interest usually no ground for, 652.
who may move for, 656.
when party may proceed for, through opposite attorney, 656.
estoppel of respondent from asking, 660, 661.
waiver of right to move for, 660, 661.
construction of stipulations, alleged to be waiver of right to, 661.
for death of respondent, and failure to make substitution, 648.
for loss of interest of appellant, 652.
motion for, how made, 657.
grounds for, must be specified in motion for, 662.
notice of motion for, requisites of, 657.
proper time for motion for, 658.
mistake, inadvertence, etc., in answer to motion for, 659.
papers used upon motion for, 657.
hearing and disposal of motion for, 662-667.
appearance at hearing and disposal of, motion for, need not be limited, 663.
rules of evidence upon motion for, 662.
when and to what extent record consulted at hearing and disposal of motion for, 664.
for defective records, how motion for, may be met, 665.
what considered outside transcript at hearing and disposal of motion for, 666.
form of presenting evidence at hearing and disposal of motion for, 666.
use of affidavits at hearing of motion for, 667.
renewal of motion for, 669.

[The figures refer to sections.]

DISMISSAL OF APPEAL—Continued.
from judgment, does not affect proceeding on appeal from order on motion for new trial, 557.
pendency of motion for, gives lower court no power, 559.
effect of, 668.
without prejudice, when proper, and effect of, 668.
from justice's court, grounds for, and practice upon, 749.

DISQUALIFICATION OF JUSTICES.
practice in cases of, 731.

DIVISION OF COURT.
equal, effect of, 724.
incurable, results in affirmance, 732.
reargument on account of, 732.
effect of, upon pending motion, 732.

DOCUMENTARY EVIDENCE.—See Evidence; Hearing and Disposal of Motion for New Trial; Statements and Bills of Exceptions.

DRINKING.
difficulty in designating point of disqualification of juror from, 175.
together of adverse party and juror, as evidence of undue intimacy, 82.
and intimacy with juror by adverse party, as irregularity, 88.

ELECTION.
between counts, refusal to compel, as irregularity, 54.

ELECTION CONTEST.
as a general rule, no new trial in, 21.
continuances of, affected by statutes, 145.

ENGROSSMENT.
of statements and bills, requirements as to, 447.
extensive powers of courts pertaining to, 446.
See Statements and Bills of Exceptions.

ENTERTAINMENT AND HOSPITALITY.
extending to jurors, as irregularity, 84.

EQUITABLE RELIEF AGAINST JUDGMENTS AND DECREES.
adopted to circumstances of each particular case, 752.
constitutes an indirect attack upon judgment, 754.
jurisdiction to grant, in proper case, well established, 752.
each case for, falls within a well-defined branch of jurisdiction, 752.
jurisdiction to grant, to be cautiously exercised, 152.
essentials of, formally stated, 752.

[The figures refer to sections.]

EQUITABLE RELIEF AGAINST JUDGMENTS AND DECREES—Continued.
mere errors and irregularities no ground for, 753.
that judgment is excessive, merely, no ground for, 753.
not granted for mere defects of form, 753.
not granted for mere insufficiency of findings, 753.
not granted for mere premature entry of judgment, 753.
not allowed to take place of remedies prescribed by statute, 752.
that party seeking relief would be benefited by re-examination, as prerequisite to, 757.
offer to do equity, as prerequisite to, 758.
none, where grounds available in original action, 759.
right of election of remedies herein, 759.
what constitutes presentation of equitable defense herein, 759.
administration of legal and equitable remedies in same court, as affecting question of, 759.
concurrent remedies by proceeding for, and by motion, 761.
failure to resort to motion or seek other remedy in former proceeding, as a bar to, 760.
failure to move for new trial in former proceeding as a bar to, 760.
for mistake, 766.
to warrant for mistake, there must be no element of negligence, 766.
mistake, by which right to move for new trial lost, as bar to, 760.
fraud as ground for, must be extrinsic fraud, 763.
what constitutes extrinsic fraud for purposes of, 763, 764.
on ground of fraud in unauthorized appearance by attorney, 765.
for fraud, consisting in collusion of attorney, 765.
distinction between actual and constructive service of summons, where fraud relied upon as ground for, 164.
accident and surprise as ground for, 767.
loss of bill of exceptions as ground for, 768.
may be granted though judgment void, in proper case, 769, 770.
where judgment void, for want of proper service, 769, 770.
where judgment void, service by individual and by officer composed, 769.
where no jurisdiction of person, 769, 770.
for matters occurring after entry or rendition of judgment, 771.
showing of diligence a prerequisite for, 755.
laches in seeking, as a bar to relief, 755.
laches in failing to acquire knowledge, as bar to, 755.
reliance upon promises no excuse for not seeking, in time, 755.
a meritorious cause of action or defense usually essential to, exceptions, 756.
false return of service as ground for, 756.

[The figures refer to sections.]

EQUITABLE RELIEF AGAINST JUDGMENTS AND DECREES—Continued.
whether tender required as prerequisite to granting, 756.
none, where the judgment or decree fixes a status, 762.
none, where decree from which relief sought establishes a will, 762.
question of parties to suit for, considered, 773.
burden of showing ground for, upon plaintiff, 754.
allegations in complaint for, must be specific, 774.
by means of bill of review, 772.

EQUITY CASES.
no error pertaining to instructions reviewable in, 308.

ERROR.
relied on, for new trial or reversal, must clearly appear, 428.
must be affirmatively shown, on appeal, 685.
relied upon, must be shown to affect substantial right, 428.
indiscriminate use of terms "immaterial" and "nonprejudicial" with respect to, 689.
whether prejudicial, or nonprejudicial, a judicial question, 695.
must be affirmatively shown, in criminal case, illustrations, 738.
compared with, and distinguished from, irregularity, 34.
warranting new trial, must have occurred during trial, 34.
in denying continuance, 123, 126.
in proceeding with trial prematurely, distinguished from abuse of discretion in refusing continuance, 127.
in ruling upon amendments, 104.
when assignable for action of court upon application to amend pleading, 107.
requirements as to specifications of, in statements and bills, 433.
pertaining to amendment of pleading, how reached, 111.
in allowing amendment, waiver, or cure of, 122.
in striking out answer, not available in absence of exception, 300.
in accepting disqualified juror, with knowledge of facts, 63.
in ruling upon challenge to juror, 68.
in ruling upon challenge, whether assignment of, the only method of reaching disqualification, 68.
in admitting evidence, upon wrong construction of pleading, 6.
in exclusion of evidence, must be clearly shown on appeal, 684.
pertaining to instructions, of no avail in absence of evidence, 684.
none reviewable, with reference to instructions in equity cases, 308.
none, in refusal to give erroneous instruction, 684.
effect of joint specification of, at hearing, 389.

[The figures refer to sections.]

ERROR—Continued.
in admitting evidence, cure of, by subsequently admitting, 689.
cure of, by striking out, 689.
cure of, by offsetting each other, 689.
See next four subdivisions.

ERRORS IN IMPANELING JURY.
as ground for new trial, 255-263.
statutory provisions affecting question of, 257.
in denying right to full panel before challenging, 263.
consisting in discharge of competent juror, not prejudicial, 255.
ruling upon admissibility of evidence upon voir dire examination, 259.
in civil cases, considered, 260.
consisting in rulings upon objections to panel, 261.
can only be predicated upon objection specifically stated, 258.
not available, where peremptory challenges not exhausted, 262.
not committed, by allowing great latitude of voir dire examination, 256.

ERRORS IN RULINGS UPON EVIDENCE.
considered, 264-301.
distinguished from insufficiency of evidence, 264.
seldom predicated upon order of introducing evidence, 265, 270.
consisting in questions propounded by court, 273.
striking out, and refusing to strike out, 297.
resulting from production and nonproduction of documentary evidence, 294.
in case of deposition, 292.
application of rules governing, to matter of opinion, 283.
predicated upon evidence offered en masse, 291.
where mere offer to make proof without actual offer of the evidence, 290.
effect herein of postponing ruling, and taking under advisement, 289.
rules governing, and illustrations of, 298.
in case of joint parties, 295.
none, without objection sufficiently specific, 273, 276, 278.
rule herein, as to "placing finger upon precise point of objection," 279, 287.
use of terms "irrelevant," "immaterial," and "incompetent," herein, 277.
when general objection sufficient, 288.
not predicable where no proper objection to secondary evidence, 274.
where no proper objection to privileged communications, 273, 275.
upon form of question, 283, 293.

[The figures refer to sections.]

ERRORS IN RULINGS UPON EVIDENCE—Continued.
none, in case of slight variance, unless specifically objected to, 280.
phraseology of objection, as basis of, 286.
when repetition of objection not necessary to support, 296.
not considered, in absence of exception, 300.
waiver and cure of, 287, 301.

ERRORS IN RULING UPON INSTRUCTIONS.
chances for, increased by constitutional prohibition, 303.
constitutional limitations herein discussed, 303, 311.
code provisions pertaining to, 310.
common-law powers of courts, in instructing juries, 303.
rule herein, that court never bound to declare bad law, 305.
with reference to rules of court touching preparation and presentation, 307.
not predicable upon statement of test by which evidence may be weighed, 319.
upon request partly correct and partly erroneous, 305.
upon court's failure to instruct as to measure or damages, 305.
upon failure to instruct as to failure of accused to testify, 305.
upon failure to exclude from consideration of jury evidence improperly admitted, 305.
consisting in assumption of proof of fact, 315.
exhibition of partiality for a particular party, 316.
comment upon credibility of witnesses, 316.
argumentative instructions, 317.
erroneous assumption of admission by counsel, 313.
expression of opinion as to what evidence proves, 315.
charging as to matters of fact, 312.
assuming truth of disputed fact in dispute, 313.
instructing touching credibility of witnesses, 311.
failing to give instructions required by statute to be given, 306.
submitting questions of law to jury, 309.
leaving construction of instruments, etc., to jury, 309.
singling out witness for criticism, 319.
reading to jury from law-book, 317.
drawing comparison between positive and circumstantial evidence, 317, 319.
charging as to presumption of fact, 318.
charging as to credibility of witnesses, 319.
giving erroneous propositions of law, 322.
calling attention to corroboration of witness, 319.
giving ambiguous or uncertain instructions, 320.

[The figures refer to sections.]

ERRORS IN RULING UPON INSTRUCTIONS—Continued.
declaring abstract principles of law to jury, 321.
reading from books to jury, 322.
giving contradictory and inconsistent instructions, 324.
in case of hypothethical instruction, 322.
several errors may inhere in same instruction, 311.
same test applied to modified as to other instructions, 323.
unlimited power of court to modify in order to secure correctness, 323.
none, in absence of request for instruction, 304.
where in part of requested instruction governed by same rule as where wholly erroneous, 304.
consists in court's decision upon request, 304, 305.
may consist in erroneous instruction given of court's own motion, 304.
in case of conflict in evidence, 305.
none, where instructions given fairly cover all phases of case, 305.
none, where court merely states the evidence and states, if true, that there is evidence tending to prove certain facts, 327.
distinction herein between stating evidence and stating substance or effect of it, 327.
none, where court truly states facts proven without conflict or admitted, or that there is a conflict, 328.
none where, in proper case, court directs a verdict, 328, 329.
exemptions anl harmless invasions herein, 326-329.
abstract instruction, not misleading, no ground for reversal, 321.
none in equity cases, 308.
doctrine herein of nonprejudicial error, 314.
how waived and cured, 331.
general rules of construction applicable, 325.
contradictory instructions considered in connection with all others given, 324.
rule herein that entire instructions construed together, 322.
cure of, by other instructions, 689.
as relating to respective duties of court and counsel, 307.
not reviewed in absence of exception, 330.

ERRORS IN RULING UPON MOTION FOR NONSUIT.
considered, 332-354.
where compulsory or involuntary, 337.
consideration of does not involve merits of motion, 335.
ruling herein is upon question of law, 332.
other methods of raising same question considered, 332.
variance as affecting question of, 339.
none, unless grounds of motion specified, 346, 347.
waiver of, 353.

[The figures refer to sections.]

ERRORS IN RULING UPON MOTION FOR NONSUIT—Continued.
right of review for, how preserved, 334.
not considered in absence of exception, 354.
reviewable by two methods, 333.
circumstances should govern choice of remedy for, 334.
new trial as remedy for, 334.

ESTOPPEL.
effect of admitting evidence of, though not pleaded, 275.
from objecting, by offering further evidence upon setting aside submission, 267.
to deny filing or sufficiency of undertaking, 552.
of respondent, from asking dismissal, 660.

EVIDENCE.
order of introducing, statues governing, 266.
seldom subject of error, 265.
documentary, error predicated upon production and nonproduction of, 294.
refusal to permit inspection of, as basis of error, 294.
how set forth in statement or bill, 432.
immaterial, omission of from statement or bill no ground for complaint, 432.
materiality of, not accepted as excuse for lack of diligence, 209.
not admissible to show effect upon jurors' minds of reading unauthorized documents, 162.
irregular receipt of written, by jury, from outside sources, 163.
cumulative, definition of, 204.
offered as newly discovered, 225, 226.
rules of, where motion heard before judge other than that trying case, 411.
for testing qualifications of jurors may be prescribed by legislature, 67.
in certain cases of misconduct of jury, 147.
governing at hearing of motion, 406, 410.
governing affidavits charging misconduct of jury, 181.
rules of, governing at hearing of motion, 410.
secondary, what amounts to proper objection to, 274.
duty to introduce rather than application based upon newly discovered evidence, 213.
consisting of lost papers, search for, required to be shown, 218.
newly discovered, nature and materiality of, must be shown, 218.
materiality of, must be shown, 220.
in record contradicting that newly discovered, 222.
corroborative, as newly discovered, 228.
conflict in, must be substantial in order to prevent review on appeal, 238.
no reason for refusing new trial for excessive damages, 232.

[The figures refer to sections.]

EVIDENCE—Continued.
conflicting, decision upon, not interfered with, on appeal, 238.
may support verdict, though verdict contrary to weight of, 236.
weight of for determination of trial court, 238.
verdict against weight of, as ground for new trial, 238.
set aside in certain jurisdictions, 238.
different effect given to on motion for nonsuit from that given upon alleged insufficiency, 240.
precise point of objection to, must be specified, 279.
offer of, en masse, effect of, 291.
en masse, proper practice relating to, 291.
rules governing, 271.
when should, and when should not be specifically directed, 271.
when proper to set forth, by question and answer, 431.
when matter considered in, without formal offer of, 272.
when not considered in passing upon application to amend, 104.
improper, may be excluded by court in absence of objection, 273.
act of court amounting to exclusion of, 273.
amounting to proof of irregularity of adverse party, 80.
implied bias, statutes as to, 74.
suppression and concealment of, as irregularity, 97.
knowingly introducing false, as irregularity, 98.
admitted to avoid continuance, how treated and regarded, 43.
motion to strike out, when proper, 298.
duty of court to rule out of its own motion when improper, 297.
striking, and refusing to strike out, as basis of error, 297.
consideration of, upon motion for nonsuit, 350.
incompetent, considered at hearing of motion, in absence of proper objection, 389.
extrinsic, not considered at hearing of motion, if not newly discovered, 389.
circumstantial, consideration of, at hearing of motion, 406.
See Error in Ruling upon Evidence.

EXAMINATION.
voir dire, of juror as to qualifications, 64.

EXCEPTIONS.
primary significance and use of, 423.
statutory definition of, 300.
statutory provisions bearing upon meaning and use of, 423.
form of, and when to be taken, 300.
not considered, unless taken at time of ruling, 273.
when preserved by law in party's absence, 300.
party need not take, though present, where law requires none, 675.

[The figures refer to sections.]

EXCEPTIONS—Continued.
to instructions, required in civil actions, 330.
need not be taken in criminal cases, 330.
simple form of, 435.
proper time and form for taking, 330.
misleading expressions of courts pertaining to, 330.
to oral charge, time and form of taking, 330.
to findings, how taken, when necessary, 588.
to rulings necessary in order to secure review, 671.
taken before referee, requirements as to, 436.
when to be taken in case of irregularity of adverse party, 102.
how taken and preserved, 620.
when proper to action of court upon application to amend, 106.
must be taken to ruling upon motion for nonsuit, 354.
necessary, to secure consideration of objections at hearing of motion for new trial, 389.
taken at hearing of motion for new trial, how reviewed, 406.
pending in supreme court, general discussion of proceeding, 458.
postponement for purpose of, 387.

EXCESSIVE DAMAGES.
as ground for new trial, 231-235.
general principles governing, 231.
new trial may be granted for, on verdict on claim in recoupment, 233.
passion and prejudice, essential elements of, when urged as ground for new trial, 231.
amount of damages not conclusive on question of, 231.
absence of standard of computation as element of, 231.
new trial for, where standard of calculation imperfect, or only partially available, 234.
slightly, no ground for disturbing verdict, 234.
new trial may be granted for, even where exemplary damages recoverable, 232.
conflicting and vague expressions of courts as to, 237.
new trial may be granted for, notwithstanding conflicting evidence, 232.
upon sixth ground, 430.
general specification of insufficiency of evidence sufficient in cases of, 434.
motion based upon ground of, may be heard exclusively upon minutes, 392.
relied upon for new trial or reversal, must be clearly shown, 430.
new trial ordered for by appellate court, 232.
See Damage Cases; Damages.

[The figures refer to sections.]

EXCUSABLE NEGLECT.
distinguished from accident or surprise, 183, 184.
not generally ground for new trial, 182, 183, 184.
as ground for new trial in New York, 98.
no ground for new trial in California, 99.
See Hearing and Disposal of Motion for New Trial.

EXECUTION.
power of court to stay, considered, 418.
of judgment, when not stayed, in absence of stay bond, 560.

EXEMPLARY DAMAGES.
new trial for, where not admissible under pleadings, 234.

EXHIBITS.
methods of incorporating, in statement or bill, 447.
and documentary evidence, substance of, may be inserted in statement or bill, 447.
may be omitted from engrossment and inserted by printer, 447.
unauthorized inspection of, by jury, 162.

EXPENSE OF TRIAL.
calling jury's attention to, as irregularity, 46.

EXPERIMENTING.
by jury, constituting misconduct, 160.

EXPERT TESTIMONY.
proper objection to, considered, 282.

EXTENSION OF TIME.
for giving notice of intention, by order of court, 364.
to give notice of intention, by stipulation, 365.
by stipulation, for serving statement or bill, 449.
for serving statement or bill, by order of court, 450.
none permissible for filing and serving statement on appeal from justice, 746.
for filing undertaking, 546.
no power for, as to notice of appeal, 543.
order for, effect of, 426.
for filing transcript, to avoid expense of duplication, 659.
for filing points and authorities, powers of court as to, 697.
whether order of supreme court granting, must be filed, 642.

FAIR TRIAL.
deprivation of, not distinguishable from deprivation of substantial right, 30.
probability of prevention of, as test, in case of irregularity of adverse party, 80.
prevention of, must actually or presumptively appear, to warrant new trial, 147, 148.

[The figures refer to sections.]

FAIR TRIAL—Continued.
irregularity must be calculated to prevent, to warrant new trial, 34.

FEDERAL COURT.
rule in, as to separation of jury, 155.

FEES.
nonpayment of, no excuse for delay, 642.

FIDUCIARY RELATION.
effect of, upon right of appeal, 526.
power of court to dispense with undertaking on appeal by those holding, 553.

FILING.
of order of supreme court extending time, whether necessary, 642.

FINAL ACCOUNT.
new trial not granted of order settling, 21.

FINDINGS.
requirements as to, and rules governing, 587-611.
statutory provisions and changes pertaining to, 588.
change from system of implied, for that of express, 588.
systems of implied, and express, distinguished, 588.
comparison of trial by court and by jury in connection with, 587.
when implied under present system, 589.
no request for, required, under present system, 288.
of ultimate fact implied where findings waived, 589.
must respond to, and dispose of the issues, 591.
not dispensed with by fact that issue raised by answer, 591.
necessary to support judgment, and not appearing, not implied, 591.
whether or not evidence introduced upon issue, 591.
statement that no evidence introduced upon issue, not equivalent to, 591.
error pertaining to, may be presented in either of two ways, 592.
orderly arrangement of, not essential, 953.
in general terms sufficient, 593.
upon a determinative issue sufficient, 593.
general, sufficiency of, may be determined by character of issue, 593.
upon all "material" issues insufficient, 593.
specific preferable to general, 593.
upon issue which disposes of case sufficient, 594.
agreed statement in lieu of, 604.
must be within issues when compared with pleadings, 596.
of no force or effect until filed, 606.

[The figures refer to sections.]

FINDINGS—Continued.
filed after entry of judgment, are nugatory, 608.
should be filed within proper time, 606.
direct, positive, full, clear and concise, 600.
free from arguments, hypotheses and unnecessary adjuncts, 600.
of ultimate rather than of probative facts, 595.
definite and certain, 592.
must be made upon material fact alleged in complaint and directly denied, 591.
should not set forth evidence, 598.
be of legal conclusions, 597.
be of mixed conclusions of law and fact, 597.
consisting entirely of evidence, not reviewed, 678.
of ultimate fact, controls finding of probative facts, 598, 602.
must not be contradictory, 601.
not required upon immaterial issue, 594.
upon issues not arising upon pleadings, 591.
where decision upon question of law alone, 591.
upon motion for nonsuit or for judgment upon pleadings, 591.
to support orders, 609.
need not set forth written instruments contained in pleadings, 593.
required upon cause of action alleged in complaint and none other, 591.
in accordance with fact admitted, unnecessary, 591.
of probative facts when disregarded, 602.
alone, effect of, 597.
perform some office as special verdict, 597.
of ultimate fact and statement of conclusion of law, distinguished, 597.
are properly no part of court's opinion, 600.
blending of, with conclusions of law condemned, 599.
not invalidated by being found among conclusions of law, 597, 599.
by referee, have effect of special verdict, 605.
conflict between, in verdict, as ground for new trial, 254.
special, by jury unsupported, as ground for new trial, 242.
uncertainty as to, as ground for motion for decision "against law," 253.
outside issues, motion as for decision "against law" cannot be predicated upon, 253.
construction of the same as of pleadings and instructions, 603.
all, construed together, 603.
waived by failing to appear at trial, 591.
waiver of, when presumed, 590.

[The figures refer to sections.]

FINDINGS—Continued.
exceptions to, still required in certain states, 588.
how taken, 588.
power of court over after filing, limited, 607.
to amend, 402, 608.
amendment of, after entry of decree, a practice not sanctioned, 1.
power to amend considered with reference to disposal of motion for new trial, 608.
power of court over, in case of mistake, misapprehension, etc., 607.

FORGETFULNESS.
cannot constitute accident or surprise, 193.

FRAUD.
extrinsic, what constitutes for purposes of equitable relief against judgment, 763, 764.
consisting in unauthorized appearance, 765.
collusion of attorney, 765.
in presenting to court, without serving, points and authorities, as irregularity, 100.
See Equitable Relief Against Judgments and Decrees.

FRIVOLOUS APPEAL.
allowance of damages for, 721.

GROUNDS FOR NEW TRIAL.
jurisdiction to grant new trial limited by, 23.
prescribed by statute, generally held exclusive of all others, 24.
in civil cases, under statutes of various states, 23.
in criminal cases, under statutes of various states, 23.
exceptions to rule that grounds prescribed by statute are exclusive, 24.
See Notice of Intention; Jurisdiction.

HEARING AND DISPOSAL OF MOTION FOR NEW TRIAL.
considered, 378-412.
meaning of, and necessity for, 378.
statutes pertaining to, 378.
notice of, when necessary, 378.
notice of, when and by whom required, 380.
argument not necessary at, 378.
remedies for denial of right to hearing, 379.
mandamus to enforce right to, 379.
premature, remedies for, 379.
motion as element of, 380.
respective powers of court and counsel in bringing on, 380.

[The figures refer to sections.]

HEARING AND DISPOSAL OF MOTION FOR NEW TRIAL—Continued.
order of precedence of motions at, 382.
how objections at, presented, 382.
proper practice at, in case of abandonment of proceeding, 382.
showing of failure to prosecute proceeding at, 383.
can be none where proceeding has lapsed, 383.
objections at for failure to file affidavits in time, 384.
on minutes, disposal of objections at, 385.
waiver of right to, by accepting settlement prior to, 386.
postponement of, 387.
issues to be retried in case motion granted, to be kept in view at, 388.
scope of inquiry at, and limitations upon, 388.
and review of, limited by grounds alleged, 389.
limitations of, by statement or bill of exceptions, 389.
limited by estoppel, 393.
when made on affidavits, 390.
when made on minutes, 392.
effect at, of joint specification of errors, 389.
matters considered in connection with affidavits at, 391.
limitation of order at, to particular issues, 394.
power of court at, to grant as to some parties and deny as to others, 395.
to limit retrial to question of damages, 396.
extensive discretionary power of court at, 397.
insufficiency of evidence furnished by affidavits at, 398.
legal limitations upon courts, at, 399.
court should fully state grounds of order at, 399.
finality of decision at, 400.
setting aside order at, for mistake, inadvertence, etc., 401.
court cannot at, substitute its opinion for verdict, 402.
effect upon of adjournment of term, 403.
power of court at, to make conditional order, 404.
performance and nonperformance of conditions imposed at, 405.
rules of evidence governing at, 406, 410.
limiting consideration of counter-affidavits on newly discovered evidence at, 407.
knowledge of court, how made available at, 408.
disqualification of jurors as witnesses at, 409.
before judge other than that trying case, 411.
exceptions taken at, how preserved for review on appeal, 406.

HEARING IN BANK.
distinguished from rehearing in bank, 726.
See Rehearing; Amendment and Correction.

[The figures refer to sections.]

HOLIDAY.
considered with reference to service of statements, bills, etc., 450.
where last day falls on, time extended one day, 642.

IDAHO.
grounds for new trial in, 23, note.

IDENTIFICATION.
of documentary evidence and affidavits used at making of order, must be by incorporating same in bill of exceptions, 626.
by certificate of judge, insufficient, 626.
of affidavits, etc., used on motion for new trial, made on minutes, 631.
when additional bill of exceptions required for purposes of, 628.

INDICTMENT.
defects in, no ground for new trial, 6, 11.
irregularity of court in sending, to jury-room, 162.

INJUNCTIONS.
effect upon, of appeal, 561.
operation of, not stayed by appeal, 556.
mandatory, operation of stayed by appeal, 562.
order granting, not revised by appeal from order dissolving, 562.

IN PARI DELICTO.
as affecting right to relief from irregularity, 89.

INSPECTION.
refusal to permit, as basis of error, 294.

INSPECTION OF ARTICLES.
after placed in evidence, unauthorized, constituting misconduct, 159.

INSPECTION OF PREMISES.
unauthorized, constituting misconduct of jury, 158.
by jury, when presumption of prejudice from, in criminal cases, 158.

INSTITUTION OF PROCEEDING.—See Notice of Intention.

INSTRUCTIONS.
objections to, not available at hearing, in absence of request and exception at trial, 388.
contradictory, motion on ground that verdict against law cannot be predicated upon, 251.
failure to follow, as constituting verdict against law, 251.
verdict against, may be "against law," 254.
to remove effect of improper statements of juror to fellow-jurors, 172.

[The figures refer to sections.]

INSTRUCTIONS—Continued.
removal of effect of unsworn evidence by, 163.
conflict between oral, and written, as irregularity, 44.
giving oral, where required to be written, as irregularity, 44.
all, or none, to be sent out with jury, 45.
oral, should be taken down by reporter, and preserved in bill of exceptions in criminal case, 738.
written, are part of judgment-roll, in criminal case, 738.
presumption of prejudice, from giving erroneous, and refusing to give proper, 689.
absence of, from statement, presumption arising from, 428.
See Error in Ruling upon Instructions; Scope of Inquiry and Rules of Decision on Appeal.

INSUFFICIENCY OF EVIDENCE.
considered, 236-254.
meaning of when used in statutes, 236.
statutory provisions for new trial for, 236.
term not interchangeable with "verdict or other decision against law," 250.
what constitutes substantial conflict hereunder, 238.
in point of fact, distinguished from insufficiency of evidence in point of law, 237.
small value of abstract judicial views pertaining to, 238.
court cannot avoid duty to decide question of, 237.
two concurrent methods of review of question of, 678.
placing of, as ground in same subdivision with "against law" explained, 252.
different remedies for, 240.
motion for nonsuit as remedy for, 240.
distinguished from error in ruling upon evidence, 264.
preponderance of evidence, 238.
available where any material fact not supported, 241.
in support of cross-complaint, as ground for new trial, 240.
in case of special findings by jury, 241.
available where material mistake in computation by jury, 241.
question of, how tested in criminal cases, 239.
no relief on ground of, without substantial prejudice, 249.
new trial not granted for, to enable recovery of nominal damages, 249.
not available unless direct decision upon point, 252.
new trial not granted on account of, on motion of defendant because of mere inadequate recovery, 249.
question of, where more than one count, verdict for aggregate sum, 245.
disbelief of witnesses as affecting question of, 243.
to support special findings by jury, 242.

[The figures refer to sections.]

INSUFFICIENCY OF EVIDENCE—Continued.
application of rules governing, to particular actions, 246.
question of, applied to will contest, 246.
in damage cases, 247.
in cases of inadequate damages, 247.
same rules as to, in special proceedings as in civil actions, 248.
theory of case when important upon question of, 244.
competency of witnesses sometimes considered hereunder, 238.
presumption in cases of conflicting evidence, 238.
specifications of, required in notice, 369.
requirements as to specifications of, in statements and bills, 433, 434.
essentials of statement or bill to show, 427.
duty of respondent where alleged in appellant's brief, 698.
to support grounds for new trial made on affidavits, 398.

INTERLOCUTORY ORDERS OR DECREES.
appealability of, 482.
statutory provisions governing, 489.
See Judgments; Orders.

INTERVENTION.
appellate rights acquired by, 530.

IRREGULARITY IN GENERAL.
definition of, 33.
compared with, and distinguished from, error, 34.
code provision relating to, 34.
difficulty in tracing result of, 34.
character and degree of, warranting new trial, 34.
classification of, according to legal effect, 35.
fatal, necessitating a new trial, 35
serious, presumptively prejudicial, but capable of explanation, 35.
harmless, unimportant, immaterial or slight, 35.
principles pertaining to, apply equally in civil and criminal cases, 36.
code provision as to duty of court to disregard, 37.
abortive legislative, attempt to prescribe duty of court in cases of, 37.
value of, as ground for new trial dependent largely upon view of court, sitting in review, 37.
warranting new trial, not limited with reference to stage of proceedings, 34.
occurring after trial, no ground for new trial, 34.
to warrant new trial, must be calculated to prevent a fair trial, 34.
both of court and jury in certain cases of separation by leave of court, 59.

[The figures refer to sections.]

IRREGULARITY IN GENERAL—Continued.
occurring during impanelment of jury, 260.
must have been objected to, in order to secure review of action by lower court, 671.
showing required, in addition to, to warrant new trial, 36.
See Irregularity of Adverse Counsel; Irregularity of Adverse Party; Irregularity of Court; Irregularity of Jury.

IRREGULARITY OF ADVERSE COUNSEL.
consisting in unwarrantably charging attempt to bribe jury, 93.

IRREGULARITY OF ADVERSE PARTY.
considered, 80-102.
general principles pertaining to, 80.
designated as "misconduct," 80.
difficult sometimes to distinguish, from misconduct of jury, 80.
and misconduct, distinguishable, 80.
instances of, difficult of classification, 80.
considered usually with reference to effect upon verdicts, 80.
as ground for new trial, propability of injury as test, 80.
wrong intent not essential to, 80.
prosecuting witness treated as adverse party herein, 85.
rule of public policy affecting, 88.
effect of fact herein that parties are in pari delicto, 89.
not predicable upon bona fide disputes as to evidence before court, 92.
interest in result sufficient, 83.
character of act alleged to constitute, important, 80.
ordinary courtesies and civilities between party and juror do not constitute, 82.
trivial acts of, disregarded, 80.
sufficient if calculated to influence one juror, 80.
of small importance, as hearing upon decision by court, 80.
when evidence of actual communications between, and jury not required, 84.
consisting in treating juror by counsel, and conversations about litigation, 86.
conversation between counsel and juror, 86.
using solicitations addressed to juror, 85.
trading with juror during trial, 87.
conduct calculated to influence jurors, 88.
deceptive conduct enhancing damages, 88.
liberal patronage of juror at place of business, 88.
improper conduct in court, 90-94.
adopting improper line of argument, 90.
improper argument, essentials of, 90.
comment in argument upon failure of defendant to testify, 91.

[The figures refer to sections.]

IRREGULARITY OF ADVERSE PARTY—Continued.
untruly stating facts in argument, 92.
referring to nondiscernible properties of exhibits during argument, 92.
improper examination and cross-examination of witnesses, 93.
interested officer having charge of jury, 95.
tampering with, or keeping, from court, other party's witnesses, 96.
suppressing and concealing evidence, 97.
misleading party to his prejudice, 99.
knowingly introducing false testimony, 98.
presenting to court, without serving, points and authorities, 100.
treating jurors, 83.
caring for horses for jurors, 84.
conversation between, and jurors, 85.
imparting unsworn evidence to juror, 85.
undue intimacy between him and juror, 82.
unfairness in selecting jury, 81.
subpoenaing talesmen as witnesses, 81.
entertainment of, and extending hospitalities to jurors, 84.
duty in case of, to call to court's attention, 101.
when exception should be reserved in cases of, 102.

IRREGULARITY OF COURT.
general consideration of, 32-62.
includes misconduct of court, 32.
acts of court usually presented under head of, 195.
not proper ground for improper question to witness by court, 273.
with reference to time and place of holding court, 38.
in administering and omitting oaths, 42.
in mode of trial, 53.
pertaining to verdicts, 78.
order of trial, 40.
right of accused to be present in criminal case, 55.
in complying with request of jury for further instructions, or advising jury without request, 44.
in giving oral, instead of written instructions, 44.
in denying right of trial by jury, 53.
in submitting wrong cause to jury, 52.
abandoned cause of action to jury, 52.
in refusing to compel election between counts, 54.
with reference to latitude allowed in examination and cross-examination of witnesses, 50.
in lecturing counsel, 48.
jury, 47.
in persuading jury to agree, 46.

[The figures refer to sections.]

IRREGULARITY OF COURT—Continued.
in accusing nonagreeing jurors of stubbornness, 46.
in process of impaneling jury, 57.
in permitting separation of jury, 59.
papers to go to jury-room, 162.
in delivering letters to jurors, 163.
in cases of authorized, but illegal separation of jury, 152.
in failure to swear jurors, 42.
to swear bailiff, 42.
witness, 42.
to admonish jury, 58.
to advise accused of his right to challenge, 56.
consisting in absence of judge at trial, 43.
giving oral, in conflict with written instructions, 44.
failure to send out instructions or papers with jury, 45.
improper communications between court and jury, 44.
trying equitable action or defense as legal, 53.
undue intimacy between court and witness, 51.
improper demeanor toward witnesses, 51.
reflections upon defendant in criminal case, 49.
comment upon testimony and witnesses, 49.
calling jury's attention to expense of trials, 46.
absence of parties at return of verdict, 55.
expression of undue solicitude for early agreement by jury, 46.
mistake of sheriff in announcing adjournment, 61.
misconduct of witness while testifying, 61.
of others than court or parties, 61.
inability of reporter to transcribe shorthand notes, 60.
receiving sealed verdict in criminal case, 78.
must be called to attention of court if opportunity offer, 62.

IRREGULARITY OF JURY.
considered, 63-79.
consisting in allowing disqualified juror to serve, 63.
disregard of statutory requirements, 78.
severe illness, or insanity of juror during trial, 76.
substitution of one not summoned as juror, 75.
pertaining to verdicts, 78.
case holding exhaustion of juror to constitute, 77.
no statutory distinction from error, in passing upon qualification of juror, 68.
showing required in case of disqualified juror, 71.
showing of diligence, when excused with reference to concealed disqualification of juror, 71.
when without prejudice, 79.
waiver of, by failure to exhaust peremptory challenges, 73.

[The figures refer to sections.]

ISSUES.
of law and fact, order in disposal of, 40.
distinguished, 3.
not joined, as ground for continuace, 127.
limitation of order for new trial to, 394.
limitation to particular, in notice of intention, 374.
both legal and equitable in same case, mode of trial of, 53.
in probate, of which a re-examination may be had must arise upon pleadings, 21.

JOINDER IN APPEAL.
subject of no importance in California; otherwise in certain states, 648.

JOINT PARTIES.
error in admitting evidence in case of, 295.

JUDGE.
absence of, during trial, as irregularity, 43.
disqualification of, as ground for new trial, for irregularity, 39.
misconduct or irregularity of, in persuading jury to agree, 46.
misconduct of, when not waived by failure to object, 62.
communications between and jury, jealously scrutinized, 44.
See Court; Jurisdiction.

JUDGMENT.
essentials of, 487.
force and effect of recitals in, 487.
signature of judge to, not necessary, 485.
final, what constitutes, 479, 480.
but one in same case, 489.
and interlocutory decree distinguished, 482.
in probate proceeding, distinguished from order, 511.
distinguished from order generally, 488.
finality of, determined without reference to forms, 488.
distinguished from interloctutory order, 482.
form of seldom prescribed by appellate court, 711.
entry of, in theory at least, purely clerical duty, 486.
right of parties with respect to, 486.
mandamus to compel, 486.
whether essential to finality of, 485.
as setting time running against right to appeal, 532.
relation to of motion for new trial, 10, 14.
error in, no ground for motion for new trial, 10.
order on demurrer in criminal case, constitutes, in California, 737.
rendition and entry of, statutory provisions governing, 485.
distinguished, 485.

[The figures refer to sections.]

JUDGMENT—Continued.
neither entry, affirmance nor collection of, affects proceeding for new trial, 417.
how finality of affected by order granting new trial as to some only of parties, 484.
setting aside, upon motion where unsupported by findings, 718.
right to enforce, distinct from proceeding for new trial, 418.
of appellate court, method of rendering, 733.
as subjects of appeal, 479-495.
statutes governing appeals from, 479.
right of appeal from limited to final 480.
policy of law in limiting right of appeal to, final, 481.
what constitutes final, for purpose of appeal, 482, 488.
vague and informal, appeal may be taken from, 491.
by default, appeal may be taken from, 492.
appeal may be taken from part of, 493.
entered pursuant to mandate of appellate court, not appealable, 494.
by consent, not appealable as a rule; exceptions, 495.
void, appeal may be taken from, 490.
in cases appealed from justice's court appeal from, 479.
necessity for further order to enforce, no obstacle to appeal from, 483.

JUDGMENT NON OBSTANTE.
relations of, to motion for new trial, 13.
new trial distinguished from motion for, 13.

JUDGMENT-ROLL.
papers constituting, 577.
bill of exceptions is part of, 621.
stipulation, or agreed statement of facts as part of, 604.
no part of bill of exceptions on appeal from order, 624, 626.
instructions are part of, in criminal case, 738.

JUDICIAL DEPARTMENT.
independent of legislative, 462.

JUDICIAL DISTRICT.
new, creation of, has no effect upon pending motion for new trial, 26.

JURISDICTION.
to grant new trial, history of, 17.
beginning of, obscure, 17.
exercise of, essential to social existence, 18.
equitable principles often applicable in exercise of, 29.

[The figures refer to sections.]

JURISDICTION—Continued.
exercise of, involves a wide range of inquiry and decision, 29.
under codes and practice acts is statutory, 22.
court's own motion, purely statutory, 414.
court of its own motion, is exercise of special, extraordinary, 413.
at hearing, limitations upon, imposed by statute, 399.
whether conferred by stipulation, 38.
dependent upon the grounds for the motion, 23.
actions and proceedings wherein exercised, 21.
in probate proceedings, 21.
lost by making final order on motion, 27.
on motion for new trial, acquisition of, 355.
of proceeding for new trial, when lost by adjournment of term, 26.
controlled by statutes, 25.
appellate, of supreme court, 462-478.
constitutionally conferred and limited, 462.
not extended to cases not fairly included, 481.
conferred by constitution, and regulated by statutes and court rules, 646.
includes power to prescribe and adopt forms of procedure, 463.
necessity for legislative scheme of, supplementing constitution, 464.
may be set in motion by resort to original writs, 464.
exercise of may be regulated by statute, 463.
definitions of, are limitations upon, 462.
conferred by constitution, cannot be increased or diminished by legislature, 462, 463.
methods of exercising, may be prescribed or adopted by court, in absence of statutory mode, 465.
statutory method for exercise of, exclusive, 466.
only conferred by compliance with each prescribed requirement of law, 543.
heads of, cases at law, 467.
heads of, limitation with reference to amount involved, 467.
heads of, cases involving legality of tax, impost, assessment or municipal fine, 472.
heads of, cases of forcible entry and detainer, 473.
heads of, actions to abate nuisances, 474.
heads of, actions of claim and delivery, 475.
in actions of claim and delivery test of value, 475.
heads of, probate matters, 476.
heads of, special cases, 477.
heads of, divorce cases, 470.

[The figures refer to sections.]

JURISDICTION—Continued.
heads of, cases involving title or possession of real estate, 471.
heads of, cases of equitable cognizance, 468.
heads of, criminal cases, 478.
in criminal cases, conflicting constitutional and code provisions pertaining to, 478.
cases of equitable cognizance in justice's court, 469.
not affected by amount involved in equity cases, 468.
cannot be conferred by stipulation, 466.
not defeated by changing character of action, after appeal taken, 479.
not defeated by failure of sureties to justify, 568.
defect of, cannot be waived, 646.
want of, of subject of appeal as ground for dismissal, 647.
effect upon, of counter claim, with reference to amount involved, 467.
effect upon, of counter claim introducing new issue, 467.
effect upon, of amendment of complaint, 467.
question of title between landlord and tenant, as affecting, 471.
dependent upon amount involved, governed by ad damnum clause of complaint, 467.
as fixed by amount involved, not affected by costs or interest, 467.
for purposes of, not necessary that title or possession real estate be solely or directly involved, 471.
reference to pleadings to determine question of, 471.
devested by issuance of remittitur, 733.
not lost by failure of sureties on undertaking to justify, 554.
of subject, and of person distinguished, 646.
of cases tried in justices' courts, 744.
of superior court over appeal from justices' courts, 733, 749.
supervisory, of supreme court, in cases appeal from justices' courts, 750.
of supreme court, in contempt cases, limited to employment of prerogative writs, 507.
of lower court, suspension of, after appeal taken, 559.
none, of lower court to control appellate proceeding, 568.
to extend time, limitation upon, 364.
limited by statute, 450.
ancient, in equity to grant relief for newly discovered evidence, 752.
equitable, over judgments at law, scope and limitations of, 752.

[The figures refer to sections.]

JURORS.

disqualification of, as witnesses, at hearing of motion for new trial, 409.
may afford two grounds for motion for new trial, 255.
source of disqualifying knowledge, immaterial, 65.
distinction between natural and statutory, or mere arbitrary disqualification, 69.
connection with legal adviser of party, disqualified as, 70.
sheriff interested, deputies disqualified as, 70.
stockholder in interested corporation, disqualified as, 70.
qualifications and grounds for challenge of, under California codes, 64.
discharge of, without beginning anew, as irregularity, 57.
disqualification as, by expression of opinion upon merits, 69.
disqualification of without prejudice, where verdict merely advisory, 79.
as witness to impeach verdict, 154.
relation to party, disqualified as, 69.
misnomer of, when without prejudice, 79.
motive of, for concealment, upon voir dire, immaterial, 72.
expression by, of opinion on merits, what amounts to, 74.
substitution as, of one not summoned, as irregularity, 75.
exhaustion of, as irregularity, 77.
insanity, or severe illness of, as irregularity, 76.
natural inclination of, to investigate independently, 157.
proper discussion between, and fellow-jurors, not interfered with, 170.
statements of, impeaching verdict governed by same rule as affidavits of, 409.
showing required in case of concealed disqualification of, 71.
See Irregularity of Jury.

JURY.

irregularity in advising, with, or without, request, 44.
communications between, and judge, as irregularity, 44.
failure to deliver instructions or papers to, as irregularity, 45.
impaneling, irregularity in process of, 57.
right of parties to have poll of, 55.
separation of, without being admonished, as irregularity, 58.
statutes pertaining to, 59.
in violation of positive statute, a fatal irregularity, 59.
after being sworn, never permissible at common law, 59.
verdict of, conceded unusual importance in certain jurisdictions, 238.
See Irregularity of Jury; Misconduct of Jury; Verdict.

[The figures refer to sections.]

JURY TRIAL.
right to, in general, 63.
at common law, of all offenses involving loss of liberty, 66.
meaning of constitutional guaranties of, 65.
constitutional guaranties of right to, 63.
may be dispensed with as to petty statutory offenses, 66.
irregularity in depriving party of, 53.

JUSTICES' COURTS.
new trials in, governed by usual rules, 28.
appellate jurisdiction of supreme court in cases tried before, 469.
concurrent jurisdiction of, with reference to right of appeal, 469.
appeals from, regulated by statute, 744.
need not await entry of judgment, 745.
how taken; effect of, 745.
scope and limits of jurisdiction of, 744.
powers of superior court on appeal from, 744.
trial de novo on appeal from, 747.
undertaking on appeal from, requirements as to, 748.
action on appeals from, compelled by mandamus from supreme court, 750.
proceedings subsequent to action of superior court, on appeals from, 751.
all prescribed steps in appeal from, are judicial, 745.
right of appeal from, not affected by nonappearance of parties, 745.
statement on appeal from, upon questions of law alone, requirements as to, 746.
disposal of appeal from, in superior court, 749.

JUSTIFICATION OF SURETIES.
proceeding for, discussed, 557-575.
requisites of, 569, 570.
on appeals from justices' courts, 570.
in appellate court, 58.
power of lower court to shorten notice of, 569, 570.
may be either before clerk or court, 570.
notice of, requirements as to, 570.
statutory changes pertaining to, and effect thereof, 567, 568.
distinguished from, proceeding under amendment of 1895, 568.
appellate jurisdiction not dependent upon, 568.
waiver of, what constitutes, 572.
none, by surety company required, 573.
stay pending proceeding for, 574.
as to undertaking failure of, no ground for dismissal, 554.

[The figures refer to sections.]

KNOWLEDGE.
of law governing competency of witnesses and admissibility of evidence required, 212.
evidence presumptively within, not newly discovered, 207.
or lack of, relationship of juror, of no importance, 72.
of juror, as disqualification, 168.
superior, of trial court, concession to in case of irregularity of adverse party, 80.
imputation of, in case of failure to examine juror upon voir dire, 71.

KNOWLEDGE OF COURT.
how made available on motion for new trial, 408.

LACHES.
and delay, in prosecuting proceeding for new trial, remedies for, 382.
excusable, in prosecuting proceeding for new trial, relief from, 382.
amounting to failure to prosecute proceeding, showing of, 383.
excusable, relief from at hearing of motion, 384.
showing of excuses for at hearing of motion, 384.
failure to make opportunity available in law, constitutes, where equitable relief is sought, 752.

LAPSE OF TIME.
changes wrought by, as basis of objection to evidence, 284.

LAW-BOOK.
examination of, by jury, as constituting misconduct, 161.

"LAW OF THE CASE."
rule of explained and illustrated, 691.
does not stand in the way of legislative changes, 691.
applies though question be one of jurisdiction, 691.
not applicable where different state of facts presented, 691.
binding as to all points supporting decision, 691.
public importance of question does not warrant departure from rule of, 691.
controlling decision is more than mere authority under rule of, 691.
operation of rule of, not evaded by mere formal amendments, 691.
amendments to pleadings may relieve case from operation of rule of, 691.
case not brought within rule of, by mere dicta, 691.
decision within rule of, must be accepted with its qualifications, 691.
effect under rule of, of requesting and obtaining decision on point, 691.

[The figures refer to sections.]

"LAW OF THE CASE"—Continued.
disregard of rule of, by lower court, constitutes mere error, 691.
mere recital of facts in opinion not effective to bring case within rule of, 691.

LECTURING JURY.
irregularity of court, consisting in, and warranting new trial, 46, 47.

LEGAL RESEARCHES.
independent, by jury, constituting misconduct, 161.

LEGISLATION.
may regulate the exercise of right to jury trial, 67.
cannot deprive party of, or abridge, common-law right to, jury trial, 65.
subsequent, effect of upon pending proceeding for new trial, 15.
subsequent, cannot affect proceeding already disposed of, 15.
See Jurisdiction; Scope of Inquiry and Rules of Decision on Appeal.

LEGISLATIVE POWER.
to add, and take away, grounds for new trial ample, 22.
to prescribe conditions governing trials undoubted, 22.

LIEN.
of judgment, effect upon, of appeal, 565.

MANDAMUS.
available to compel entry of judgment, 486.
use of in connection with hearing and disposal of motion, 379, 383.
to compel hearing and disposal of motion, no answer to, that no reporter at trial, 392.
to compel settlement of statement or bill, 457.
remedy by, compared with that by appeal, 499.
remedy by, compared with that by appeal to procure settlement, 456.
lies to compel settlement, though proceedings not taken down by reporter, 457.
does not lie to direct manner of settling statement or bill, 457.
use of, in cases appealed from justices' courts, 750.

MINUTES.
limitation of scope of inquiry at hearing upon, 392.
phonographic notes as part of, 392.

MISCONDUCT OF ADVERSE PARTY.
of small importance as bearing upon decision when trial without jury, 80.
See Irregularity of Adverse Party.

[The figures refer to sections.]

MISCONDUCT OF JURY.
general discussion, 147-181.
a subject of many phases, 147.
statutory and code provisions relating to, 147.
must be such as actually or presumptively negatives fair trial, to warrant new trial, 147.
importance of attendant circumstances, 147.
character of act alleged to constitute, and attending circumstances, of controlling importance, 148.
term, often erroneously used interchangeably with "irregularity," 148.
difficulty, in cases of, of showing actual prejudice, 148.
should be promptly called to attention of court, 149.
promptly called to court's attention, 149.
exceptions to rule requiring party to call, to attention of court, 149.
in separating, 150-156.
importance of attending circumstances, 151-153.
after final retirement, statutory provisions relating to, 151.
legal phases of, in California, 152.
general view, 150.
statutes relating to, 150.
great relaxation of ancient rules governing, 150.
divergent views in different states, 150, 152.
after final retirement, usually fatal to verdict, 151, 153.
same general principles apply in criminal, is in civil, cases, 152.
discrimination by courts without differences, pertaining to, 153.
principle relating to, of uniform applicability, 153.
consideration to be given to stage of trial, 153.
cases of accident and necessity constitute exceptions to rule, 153.
no general presumption or prejudice from, in absence of statutory direction, 154.
consent as affecting, 154.
when harmless and necessary, illustrations, 156.
views in particular states, with reference to, 154.
rule in federal court, 155.
consisting in carrying on independent investigation and receiving and considering unsworn evidence, 157-174.
unauthorized inspection of premises, 158.
agreeing to "quotient" verdict, 179.
agreeing to "quotient" verdict, prior agreement essential to constitute, 179.
inattention and indifference to oath, 180.
unauthorized inspection of premises in criminal case, when and where not, presumed to be prejudicial, 158.
reaching verdict by resort to chance, 178.

[The figures refer to sections.]

MISCONDUCT OF JURY—Continued.
reaching verdict by resort to chance, different arrangement of provisions in Penal Code and Code of Civil Procedure, 178.
oral statements by jurors to fellow-jurors, 168.
experimenting, 160.
unauthorized inspection of articles in evidence, 159.
receiving oral communications from others than parties, 165.
receiving papers and documents irregularly, 162.
receiving writings from outside sources, 162.
receiving printed matter from outside sources, 163.
receiving oral communications from party, or counsel, 164.
hearing general comment on case in promiscuous assemblage, 166.
their improper association, alone, 167.
receiving unsworn evidence, knowledge of juror imparted to fellow-jurors, 168, 169.
receiving evidence out of court, ignorance of party and counsel must be shown, 163.
independent legal researches, 161.
reading public prints; character of important, 173.
disclosing secrets of jury-room, 174.
drinking intoxicating liquors, 175-177.
drinking at bar of prosecuting witness, 84.
moderate stimulation does not constitute, 175.
Iowa rule compared with rule of other states, 175.
effect upon juror all important, 175.
stage of trial of but little importance, 175.
concession, as to effect, to superior knowledge of trial judge, 176.
should be called to court's attention, 177.
consisting in reaching verdict by unfair means, 178, 180.
when and where not presumed prejudicial, 166.
prejudice presumed to result from, according to circumstances, 166.
proper discussion among jurors, not constituting, 170.
removal of effect of, by instruction, 172.
essentials of affidavits charging, 181.
rules of evidence and burden of proof at hearing of motion based upon, 406.

MISCONDUCT OF OTHERS THAN COURT OR PARTIES.
constituting irregularity, 61.

MISTAKE.
ignorance of law does not constitute, 766.
of law cannot constitute accident or surprise, 188.
governing competency of witness no ground for new trial, 212.
mutual, as to true theory of case, constituting surprise, 198.

[The figures refer to sections.]

MISTAKE—Continued.
in computation by jury, as ground for new trial for insufficiency of evidence, 241.
as ground for new trial in Minnesota, 19.
See Equitable Relief Against Judgments and Decrees.

MISTAKE, INADVERTENCE, ETC.
not generally ground for new trial, 183, 184
of jury, setting aside verdict for, 409.
setting aside order on motion for new trial for, 401.
relief from, by granting new trial of court's own motion, 416.
in answer to motion to dismiss, 659.
execusable, in filing and serving transcript, relief from, 642.
in proceeding to settle statement or bill, relief from, 451.
relief from, with reference to statements and bills, 445.
as ground for relief against judgment, 766.
in record, on appeal, amendment of, 766.
of jury, exception in cases of, as to scope of review, 679.
renders issuance of remittitur void, 734.
See Hearing and Disposal of Motion for New Trial; Statements and Bills of Exception.

MISTRIAL.
new trial distinguished from, 9.

MODE OF TRIAL.
wrong, irregularity of court consisting in, 53.

MODIFICATION.
after decision on appeal, extensive powers of court with respect to, 730.
governed by like practice as rehearing, 730.
may be made of court's own motion, 730.

MONTANA.
grounds for new trial in, 23 note.

MOOT QUESTIONS.
not entertained or decided, 702.

MOTION IN ARREST.
order of precedence of, 381.

MOTION FOR JUDGMENT.
cannot be granted for insufficiency of evidence, 240.
non obstante, proper order for disposal of at hearing of motion for new trial, 381.

MOTION FOR NEW TRIAL.
to be directed at findings or verdict, 1.
must be preceded by trial and decision, 2.
proper order for disposal of, 381.
a mere incident, or essential part of hearing, 385.

[The figures refer to sections.]

MOTION TO QUASH.
motion for new trial distinguished from, 11.

MOTION TO STRIKE OUT.
when proper, in case of improper amendment, 111.
not entertained for mere irregularities and omissions, 710.
a proceeding not favored in California supreme court; in use elsewhere, 710.
evidence, when proper, 299.
must be specified, 299.
ruling on, of no avail without exception, 300.

MOTIONS.
at hearing and disposal of motion for new trial, 380.

MOTIVE.
in case of irregularity of adverse party, too much importance sometimes attached to, 80.

NAME.
wrong, of juror, when without prejudice, 79.

NEGLIGENCE.
forgetfulness of party and counsel as constituting, 217.
in preparation for trial, bars motion based upon accident or surprise, 189.
See Affidavits.

NEVADA.
grounds for new trial in, 23, note.

NEW DEFENSE.
opportunity to set up, no ground for new trial, 5.

NEW TRIAL.
defined, 1.
exclusive method for review, in same court, in equitable, as well as other, actions, 1.
distinguished from correction of conclusions of law, 8.
independent character of proceeding for, 14, 417.
exclusive remedy for party dissatisfied with findings, 358.
may be proceeded for, by party in whose favor verdict or decision rendered, 358.
after decision on appeal from justice's courts, may be granted, 749.
none, in case of judgment upon stipulation, 4.
grounds for, relied upon must be designated in notice, 368.
may be granted of court's own motion, as exercise of special extraordinary jurisdiction, 413.
of court's own motion, when, 413-416.
of court's own motion, comparison of jurisdiction with same at common law, 414.

[The figures refer to sections.]

NEW TRIAL—Continued.
of court's own motion, power for, exclusively statutory, 414.
of court's own motion, limitation upon time for making order for, 415.
court's own motion, as result of relief from mistake, accident, etc., 416.
no waiver by proceeding for as general rule, 422.
may be ordered by appellate court for excessive damages in opposition to view of lower court, 232.
ordered by appellate court, to be entered according to views expressed in opinion, 719.
not proper method of review, of decision of supreme court in original proceeding, 728.
several, in same case, 412.
second application for, when entertained, 400.
proceeding for as hearing upon enforcement of judgment, 418.
effect of with reference to order on appeal, 716.
order on motion for, upon powers of trial court, 559.
granting, upon status of parties at retrial, 421.
benefit of granting motion for, belongs exclusively to those joining in motion, 420.
granting, reopens case upon all issues, unless restricted, 421.
relation of pending motion for, to ancillary process and auxiliary proceedings, 419.
effect of statutory changes upon proceeding for, previously begun, 377.
statutory provisions, effect of upon proceeding, previously commenced, 377.
statutory requirements of statutes governing new trials, mandatory and jurisdictional, 25.

NEWLY DISCOVERED EVIDENCE.
as basis of motion for new trial, 204-230.
a subject of much difficulty and divergence of opinion, 204.
statutory provisions governing, 204, 205.
means evidence discovered since the trial, 207.
that the evidence, and not merely its materiality must have been newly discovered, 207.
cannot be predicated upon facts known to members of party's own family, 207.
can only be predicated upon facts or transactions antedating trial, 208.
analogy, interdependence and concurrence between, and accident or surprise as ground of relief, 185.
and accident or surprise, as joint grounds for new trial, 185.
disfavor of, as ground for new trial, as tending to enlarge discretion of court, 206.

[The figures refer to sections.]

NEWLY DISCOVERED EVIDENCE—Continued.
recent tendency of courts to omit reference to disfavor with which motion based upon, viewed, 206.
motion based upon, favorably considered in cases of concealment by opposing counsel, 206.
cannot be predicated upon perjury of witnesses, as a rule, 220.
predicated upon forgetfulness of witnesses, 217.
predicated upon forgetfulness of counsel, 217.
sufficient if material as to amount of recovery, 223.
cumulative, discussion of rule as to, 225, 226.
inharmonious decisions referring to cumulative evidence offered as, 226.
rule as to cumulative evidence offered as, of slight value, 225.
misleading definitions of cumulative evidence offered as, 225.
same rules applicable to merely impeaching, as to cumulative evidence, 227.
must not be merely defective to impeach witnesses, 227.
no objection to corroborative evidence as such, 228.
probability of different result must be shown in affidavit's setting up, 221.
failure to introduce secondary evidence in answer to motion based upon, 213.
failure to apply for continuance, in answer to motion based upon, 216.
new trial not granted for, when in conflict with that given at trial, 211.
failure to acquire knowledge of objects and transactions brought to attention of party, as answer to, 215.
failure to examine and cross-examine witness in answer to, 214.
ignorance of law governing competency of witnesses, as affecting, 212.
essentials of application based upon, 205.
diligence as element of, must be specifically shown, 218.
required in application based upon, 209.
requires finding and calling of witnesses, 210.
exceptions to, and relaxations of, rule requiring diligence, 219.
duty to prepare upon all available defenses, 211.
requisites of affidavits setting up contents of lost papers, 230.
application based upon, meritorious, when sufficient, 204.
essentials of, affidavits of witnesses upon motion based upon, 230.
competency of, must be shown, 224.
nature and materiality of, must be shown, 218, 226.
use of counter-affidavits where application based upon, 229.
limitation of consideration of counter-affidavits when motion based on, 407.
reference to record upon motion for new trial based upon, 222.

[The figures refer to sections.]

NOMINAL DAMAGES.
new trial not granted to enable party to recover, 249.

NONJOINDER.
of parties, no ground for new trial, 6.
in motion for new trial, effect of, 420.

NONSUIT.
error in deciding motion for, considered, 332-354.
involuntary, distinguished from voluntary dismissal, 336.
same rules of evidence apply upon, whether trial by court or jury, 351.
how right to, affected by defendant's pleading, 338.
grounds of motion for, must, as a rule, be specified, 346, 347, 349.
how plaintiff's evidence considered upon motion for, 350.
motion for, as remedy for insufficiency of evidence, 240.
submission of motion for, may be set aside to receive evidence, 267.
of the judgment to which defendant entitled upon granting motion for, 352.

NOTICE.
of decision, what constitutes, 426.
of entry or filing of order, with reference to service of bill, 426.
of hearing of motion, when required, 380.
of intention, cannot give second, so as to extend time for filing statement, 426.
of justification of sureties, requirements as to, 570.
of motion, as governing form in which evidence presented, 410.
of motion to dismiss appeal, requisites of, 657.
of motion to dismiss appeal, when dispensed with, 657.
of nonacceptance of amendments, none required, 452.
of time and place for settlement of statement or bill, requisites of, 453.
See next four subdivisions.

NOTICE OF APPEAL.
considered, 532-543.
statutory provisions governing, 532, 533, 534.
two methods of giving, in Washington, 534.
form and requisites of, 534.
requisites of, where appeal from part only of judgment or order, 534.
must contain proper signature, 535.
question of proper attorney to sign considered, 535.
may be effectually given by attorney other than of record, and without substitution, 535.
proper signature to, in criminal cases, 535.
required, in proper form, of each judgment and order appealed from, 534.

[The figures refer to sections.]

NOTICE OF APPEAL—Continued.
compliance with statutory requirements governing necessary to confer appellate jurisdiction, 543.
filing and service of, a jurisdictional prerequisite, 534.
time for giving cannot be extended, 543.
cannot be dispensed with by stipulation, 543.
on whom should be served, 536, 538, 541.
involves question of proper parties, respondent, 531.
meaning of "adverse party" used in connection with, 536, 538.
sense in which filing and service of, constitutes taking of appeal, 533.
relation of, to undertaking, 533.
filing, laws governing filing papers generally applicable, 539.
must be filed; statutes governing, 539.
filing of, must appear by transcript, 638.
when to be served, 540.
time for giving inseparably connected with time for appealing, 532.
appeal pending from time of serving and filing, 532.
when time begins to run against right to give, 532.
time for giving, where judgment amended, 532.
how served, 541.
connection of service of, with filing undertaking, 541.
for purposes of, parties chargeable with knowledge of entry in California, 532.
entry of orders in probate matters as affecting time for giving, 532.
proof of service of, may be made in California supreme court; otherwise in certain states, 638, 648.
when service of, upon party individually sufficient, 542.
failure to serve and defective service of, distinguished, 646.
service of, may be waived, 543.
as part of record on appeal, 578.
need not be contained in statement or bill, 432.
an essential part of record on appeal from order, 627.

NOTICE OF DECISION.
required, to ripen time for notice of intention, 361, 362.
what constitutes, 362.
waiver of, 363.

NOTICE OF ENTRY OF JUDGMENT.
required in some states before time ripe for appealing, 532.

NOTICE OF INTENTION.
considered, 355-377.
general office of, 355.
statutory provisions pertaining to, 357.
inapplicable decisions pertaining to, 357.
usual method of acquiring jurisdiction, 355.
former practice of giving notice of motion, 361.

[The figures refer to sections.]

NOTICE OF INTENTION—Continued.
when time ripe for, 360.
when time for, begins to run against movant, 361.
extension of time for giving, 364.
when need not be given until notice of decision, 361.
answers purpose of a pleading, 355.
who entitled to give, 358.
not usually part of statement or bill, otherwise in Montana, 432.
effect of inserting, in statement or bill, 441.
mention of, in statement or bill not necessary, 440.
requisites, of generally, 366.
requisites of statement of movant's intention in, 367.
requisites of, must designate the grounds relied upon, 368.
requisites of, designation of papers to be used, 369.
may designate various papers as basis, 369.
restriction in, of motion to particular issues, 374, 394.
must be properly addressed, 371.
must be properly signed, 370.
method of stating grounds relied on in, 368.
must be served, 372.
improper joinder in connection with, 372.
serving, what constitutes, 372.
upon whom should be served, 359.
should be served upon every party to be adversely affected by setting aside judgment, 359.
must be filed as well as served, 372.
what constitutes filing of, 372.
waiver of, what constitutes, 375.
amendment of, 376.
how and when objection to sufficiency of, to be made, 373.

OATHS.
inattention and indifference to, of juror, as misconduct, 180.
irregularity in administering, and failing to administer, 42.
failure to administer, to juror, waived by not objecting, 42.
substantial observance of statute governing required, 42.
failure to administer, to witness, as irregularity, 42.
to bailiffs in criminal cases, as irregularity, 42.

OBJECTION.
to competency not raised unless specified, 277, 278.
in case of excessive drinking of juror, should be seasonably presented, 177.
duty of party to make, or call irregularity to attention of court, 62.
to irregularities, must be urged at first opportunity, 101.

[The figures refer to sections.]

OBJECTION—Continued.
to evidence, with reference to relation of time, 281.
must be made at time of offer, 273.
must reach the proper point of inadmissibility, 273.
what constitutes sufficient specification in, 276.
based upon slight variance, required, 280.
how made with reference to changes wrought by lapse of time, 284.
impeaching party's own witness, sufficiency of, 285.
phraseology of, as basis of error, 286.
that evidence is irrelevant, immaterial and incompetent, usually too general, 277.
effect of postponing, and taking under advisement, 289.
repetition of, not necessary, when, 296.
when general, sufficient, 288.
when none, necessary in case of improper argument to jury, 90.
to juror, should be specifically stated, 258.
to statement or bill, may be first formally made at settlement, 452.
to transcript, what may be taken, and how, 643.
proper, must appear of record in order to obtain review, 671.
how should appear in bill of exceptions, 616.
by successful party, need not be set forth in bill or statement, 428.
need not be repeated in specifications of error, 435.
to sufficiency of notice of intention, how and where made, 373.
at hearing, how presented and disposed of, 382.
at hearing upon minutes, presentation and disposal of, 385.
based upon failure to file affidavits in time, how presented, 384.

OFFER OF EVIDENCE.
sufficiency of, 272.
specifying purpose of, 271.
See Errors in Ruling Upon Evidence.

OFFER TO MAKE PROOF.
in lieu of actual production of evidence, as basis of error, 290.
See Errors in Ruling Upon Evidence.

OFFICER.
interested, in charge of jury, as irregularity, 95.

OPINION OF LOWER COURT.
distinguished from statement of grounds for order on motion for new trial, 693.
cannot be substituted for findings, 600.
has no place in record, 693.

OPINION OF SUPREME COURT.
and order construed together, 716.
sometimes contains matter for future guidance of trial court, 674.

[The figures refer to sections.]

ORAL CHARGE.
proper time and form of excepting to, 330.

ORAL COMMUNICATIONS.
misconduct of jury in receiving, 164, 165.
between jurors and outside parties, when prejudicial, when harmless, 165.

ORDER.
statutory definition of, 496.
distinguished from judgment, 488.
conditional, effect of performance and nonperformance of terms of, 405.
terms and conditions of, must be reasonable, 404.
on motion for new trial, power of court to make, 404, 405.
construction of, 405.
conditions in, what constitutes performance of, 405.
on motion for new trial, finality of, 400.
reasons for making, when and how far considered, 399.
when to be incorporated in statement or bill, 432.
limitation of, to particular issues, 394.
setting aside, for mistake, inadvertence, etc., 401.
construction of, 399.
for new trial upon court's own motion, to be made within limited time, 415.
granting new trial, may be made after affirmance of judgment on appeal, 417.
what constitutes, for purposes of appeal, 496.
to be effective must be positive direction, 496.
for purpose of appeal, not required to be made in open court, 496.
generally, as subject of appeal, 496-510.
void, but in due form, is appealable, 510.
appeal from, authorized by statute, 497.
appeal lies from original only; exceptions, 498, 511, 512.
on motion for relief from "proceeding," appeal may be taken from, 499.
entry or filing of, a prerequisite to right of appeal from, 518.
appeal cannot be taken from, by party shown on face of judgment to have no interest, 527.
appellate rights of persons not original parties, with respect to, 508.
appellate right of party with respect to, as against intruder into action, 509.
on motion for new trial, appealability of, discussed, 501.
refusing to dissolve attachment, appealability of, 504.
changing place of trial, appealability of, 505.
in contempt cases, usually not reviewable on direct appeal; exceptions as to particular states, 506.

[The figures refer to sections.]

ORDER—Continued.
in partition, appealability of, 513.
pertaining to costs, considered with relation to judgment, with respect to their appealability, 519, 520.
amount involved in, as affecting appealability of, 520.
appealable without appeal taken from judgment, 520.
ex parte, appealability of, considered, 502.
in injunction case, appealability of, 503.
granting temporary injunction, must be appealed from before same is perpetuated, 503.
on motion to vacate judgment, when, and when not, appealable, 500.
showing required, 500.
in probate proceeding, distinguished from judgment, 511.
appealability of, 511-516.
in probate, policy of law to curtail appeals from, 511.
on motion for new trial in probate, appealability of, 512.
in probate, statutory provisions governing appeal from, 511.
granting, refusing to grant, revoking or refusing to revoke, letters testamentary, of administration, or of guardianship, appealability of, 514.
for judgment, for the payment of a debt, claim, legacy, or distributive share, in probate, appealability of, 516.
settling an account of an executor, administrator, or guardian, or refusing, allowing or directing the distribution or partition of an estate or any part thereof, appealability of, 515.
special, meaning of, 517.
as to relation of, to final judgment, 518.
after final judgment, appealability of, 517-521.
for purpose of appeal, must not be reviewable on appeal from judgment, 517, 518.
made after final judgment, illustrations of appeals from, 521.
made after final judgment, little significance of, in probate matters, 517.
on motion for new trial, distinguished from special order made after final judgment, 517.

ORDER OF PROOF.
statutes governing, 266.

OREGON.
grounds for new trial in, 23, note.
jurisdiction in, to grant new trials, simliar to that exercised at common law, 19.
limited power of review of order on motion for new trial in, 19.

OVERSIGHT.
cannot constitute accident or surprise, 192.

[The figures refer to sections.]

PANEL.
party entitled to full, before exercising right of challenge, 263.

PARTIES.
to proceeding for new trial, 358.
necessary and proper, to suit for equitable relief against judgment, 773.
to appellate proceeding, consideration of, 522-531.
statutory provisions governing, 522.
who are, with respect to right to appeal from orders, 508, 509.
"aggrieved," meaning of, with reference to appeals, 525.
are "aggrieved" whose substantial rights are incidentally affected, 530.
to appellate proceeding, tests for determining who proper, 523-527.
having no interest in judgment, may not appeal, 527.
other than original, appellate rights of, 530.
appellant, outside parties may become, when and how, 530.
by intervention, appellate rights of, 530.
respondent, closely connected with subject of notice of appeal, and thus treated, 531.
recovering judgment, appellate rights of, 528.
transfer of interest of, as affecting right of appeal by, 529.
holding fiduciary relation, appellate rights of, 526.
loss of interest by, as affecting appellate rights of, 529.
appellant, need not wait until steps taken to enforce judgment or order, before appealing, 525.
status of, maintained by filing stay bond on appeal, 559.
joinder of, in appeal, a subject of little importance, 524.
want of jurisdiction of, as ground for dismissing appeal, 648.
court may discriminate between, in order disposing of motion, 395.
nominal, same degree of diligence required of, as of real, 209.
duty of, to make full disclosure as to witnesses to counsel, 209.

PARTITION.
appealability of orders in, 513.
new trial in, 21.

PERSUASION.
of jury by judge, as irregularity, 48.

PHONOGRAPHIC REPORT.
meaning of, in connection with hearing of motion, 392.
not essential to hearing upon minutes, 392.

PLEADINGS.
to reach defects in, no ground for new trial, 6.
statutes giving and regulating right to amend, liberally construed, 105.
defectiveness in, distinguished from absence of, 353.
defects in, and objections to, not considered at hearing of motion, 388.

[The figures refer to sections.]

POINTS AND AUTHORITIES.
rules of practice governing, 697.
appellant should make all his, in opening brief, 699.
additional, should not be filed at final hearing, 699.
should not be reserved for petition for rehearing, 700.
failure to file, as ground for dismissal, 654.
suggestions as to essentials of, 697.
duty of respondent to answer, 698.
improper matter in, how dealt with, 701.
striking out, for containing improper matter, 701.
not stricken out for mere misstatement of facts, or misrepresentation of record, 701.

POSTPONEMENT.
of hearing of motion, largely discretionary, 387.
of ruling, error herein considered, 289.

PRACTICE.
general matters of, in appellate court, 696-710.
governing argument in appellate court, 696.
points and authorities, 697.
the rendition of decisions by appellate courts, 703.
where succession of interest, pending appeal, 704.
proper, for correction of mistake in supreme court record, 729.

PRAYER.
may be amended, 120.

PRECEDENTS.
value of as establishing limitation upon power to grant new trials, 20.

PREJUDICE.
test as to, with reference to instructions, 321.
not shown when newspaper reaching juror correctly states evidence and proceedings, 173.
actual need not usually be shown from oral communications by party or counsel to jury, 164.
in case of misconduct of jury, need only be made potentially to appear, 148.
showing of, required, where ruling postponed, 289.
slight showing of, sufficient where verdict returned in absence of counsel, 55.
none, where irregularity of jury trivial 79.
decisions that showing of, necessary, in case of disqualified juror, 69.
resulting from jury receiving unsworn evidence, removal of, by instruction, 163.
showing of, necessary to entitle party to standing as appellant, 525.

[The figures refer to sections.]

PREJUDICE—Continued.
presumption of, dependent upon character of unsworn evidence received, 165.
in case of improper statements by juror to fellow-jurors, 171.
when adverse party converses with juror about case, 85.
in case of irregularity of adverse party, divergent views herein, 80.
presumed to result from improper argument, when, 90.
from communications with jury calculated to impress them against losing party, 166.
whether presumed in case of improper public prints reaching jury, 173.
may be presumed from circumstances attending intercourse between party and juror, 88.
when, and when not, presumed. in case of unauthorized inspection of premises by jury, 158.
in case of separation of jury, no general rule of presumption of, 154.
whether resulting from error, a judical question, 689.
none, presumed where failure to admonish jury upon slight or momentary separation, 58.
no presumption of, in federal court, in case of separation of jury, 155.
rebutting presumption of, at hearing of motion for new trial, 406.

PREPARATION FOR TRIAL.
must be commensurate with any proof that may be reasonably anticipated, 189.
best showing by opposite party to be anticipated, 202.
prevention of, by deception of adverse counsel, constituting surprise, 196.

PRESUMPTIONS.
against error, in appeal, 685.
and their rebuttal, 686.
arising upon the record, in criminal case, 740.
as to sufficiency of notice of intention, 440, 441.
of injury in case of irregularity, 36.
from irregularity of adverse party, 80.
from error, given a freer operation in criminal than in civil cases, 741.
of knowledge of contents of public records, 213.
of prejudice from error or irregularity considered, 689.
from erroneous admission of evidence; peculiar distinctions in certain jurisdictions, 689.
none, where record does not purport to contain all the evidence, 684.

[The figures refer to sections.]

PRESUMPTIONS—Continued.
arising from improper association of jurors, 167.
from improper statements by juror to fellow-jurors, 171.
from unauthorized and unexplained separation of jury, 151.
none, in federal court, in cases of separation of jury, 155.
in case of conversation between counsel and juror, 86.
upon showing of misconduct, 148.
of correction of improper remark of counsel by instruction, 428.
of due observance of order of disposal of issues, 40.
in favor of judgment or order appealed from, limit review, 684.
judgment or order appealed from must be overcome by appellant, 684.
judgment or order, operation of, modified on appeal from nonsuit, 684.
affirmative act of court, easily overcome, 684.
propriety of amendment, in absence of affirmative showing, 696.
in case of excessive judgment, that excess was for costs, 686.
erroneous refusal to instruct, 684.
of statements and bill of exceptions, 687.
as to use of statement or bill on motion, 423.
none, where instruction erroneous under any and all circumstances, 684.
of regularity in proceedings to settle statement or bill, 456.
of consent, making of orders, service of notices, etc., 684, 686.
of waiver of findings, 590.
not strong, 590.
easily overcome, 684.
of jury trial, how overcome, 684.
where no diligence shown, 190.
operation of, not the same where evidence has been rejected as where admitted, 684.
that court fully instructed jury, 684.
same, in cases of irregularity and error, upon review, 3, 8.
that court admonished jury in case of improper remarks, 684.
that evidence within knowledge, as answer to alleged newly discovered evidence, 207.
that evidence erroneously admitted stricken out, where no affirmative showing, 686.
that incompetent evidence was limited by instructions, 428.
that grounds specified in statement or bill were in fact argued, 440, 441.
that one against whom judgment rendered, or order made, is aggrieved thereby, 525.
that party aggrieved by judgment against him, rebuttal of, 527.
that statement or bill contains all material evidence, 427, 431.
easily overthrown, 427.

[The figures refer to sections.]

PRESUMPTIONS—Continued.
none, where record does not purport to contain all the evidence, 684.
where record fails to show date of filing complaint, 686.

PRIVILEGED COMMUNICATIONS.
what constitutes proper and timely objection to, 273, 275.

PROBATE PROCEEDINGS.
appeals from judgments and orders in, 511-516.
contest for family allowance, no new trial of order for, 21.
jurisdiction to grant new trials in, 21.
of what orders in, new trial may be granted, 21.
order in, for probate of will, proper subject of motion for new trial, 21.

PROCEEDING.
for new trial, various methods of instituting, 36.
settlement of statement or bill constitutes a, 423.

PROSECUTING WITNESS.
may not communicate with jury, 164.
treated as adverse party with respect to irregularities of, 85.

PUBLIC INTEREST.
may warrant review of decision upon immaterial point, 674.

PUBLIC POLICY.
effect of rule of, in cases of irregularity of adverse party, 88.

"QUOTIENT" VERDICT.
defined, 179.
exception as to, under rule excluding affidavits of jurors, 409.

REARGUMENT.
on account of equal division of court, 732.

REASONABLE DOUBT.
must be removed by evidence in criminal cases, 239.

RECITALS.
in judgment, force and effect of, 487.

RECORD ON APPEAL.
from judgments, generally, 576-578.
statutory provisions pertaining to, 576.
statutory designation of papers constituting, exclusive, 577.
judgment-roll as part of, 577.
notice of appeal as part of, 578.
statement on motion for new trial made on minutes as part of, 630.
from justices' courts, what constitutes; statutes governing, 747.
how transmitted, 747.

[The figures refer to sections.]

RECORD ON APPEAL—Continued.
from order, 622-632.
general view, 622.
judgment-roll not necessarily any part of, 624, 626.
from intermediate orders, and special orders made after final judgment, 622-626.
from order, notice of appeal an essential part of, 627.
statutory changes pertaining to, 623.
on motion for new trial, 627-632.
statutory designation of, 627.
entries, considered in review of action of court upon amendments, 104.
how far stipulation as to, sufficient, 636.
in criminal cases, what constitutes, 738.
illustrations of rule that error must affirmatively appear, 738.
opinion of lower court, no part of, 693.
proof of service of notice of appeal as part of, 578.
recitals by clerk as to what constitutes, of no force or effect, 637.

RECOUPMENT.
new trial for excessive damages upon claim in, 233.

REDUNDANCY.
in statement or bill, to be stricken out, 431.

RE-EXAMINATION.
the equivalent of retrial as used in the code, 1.
subject of, and grounds for, to be distinguished, 4.
reaches back to, and begins at pleadings, 2.
must be of material issue arising upon pleadings, 4.
none, in case of agreed facts, 4.

REFEREES.
proceedings before, are quoad those of the court, 436.
statutory provisions relating to proceedings before, 436.
what decisions by, proper subjects of motion for new trial, 16.
applicability of statutes governing new trials to trials by, 16.

REHEARING, AMENDMENT AND CORRECTION.
considered, 725-732.

REHEARING.
power to grant, inherent, 725.
distinguished from hearing in bank, 721.
constitutional and statutory provisions governing, 725.
legislature cannot prescribe exclusive method for, 725.
most statutes seeking to regulate, invalid, 725.
order granting after time fixed in constitution, void, 727.
only granted of final judgments and orders, 725.
not granted upon purely technical grounds, 725.

[The figures refer to sections.]

REHEARING—Continued.
and hearing in bank, not a matter of legal right, 727.
only matters of record can be properly urged as ground for, 727.
points waived cannot be reheard upon, 672.
and hearing in bank, proceedings for, 727.
petition for, must be filed and question of, disposed of before issuance of remittitur, 727.
filing petition for, deposit in express office in proper time equivalent to, 734.
after decision in original proceeding, 728.
permissible after decision by the court in bank, 725,
upon appeal from justices' courts, unknown to practice, 749.

RELATIONSHIP.
to adverse party, in case of irregularity, 83.

RELIEF GIVEN ON APPEAL.
discussion of, 711-724.
methods and forms of directing, 716.
power to grant, exercised in great variety of forms, 712.
power over subject of, given by constitution, 711.
statutory provisons on subject of, 711.
in granting, making of findings on omitted issues not permissible, 712.
where trial court had no jurisdiction, 712.
restitution as part of, may be directed, but not directly enforced, 713.
may consist in modification upon remission of excess, 713.
modification as, may be conditional, 713.
conditional, performance of conditions, 713.
conditional, effect of performance or nonperformance of conditions, 713.
where remission of part of judgment permitted, 713.
order remanding adds nothing to reversal as, 716.
where court equally divided, 724.
effect of, upon powers of lower court, 719.
title vested under judgment not devested by reversal, 717.
case reinstated on reversal of order granting nonsuit, otherwise where appeal from the judgment of nonsuit, 717.
where conflicting orders in same case, 718.
where appeal frivolous, 721.
may extend to compelling restitution of costs, 720.
consisting in reversal, effect of upon other proceedings in case, 717.
reversal, restitution upon, 720.
allowance of damages upon dismissal, 722.
allowance of costs, 723.
allowance of attorney's fees, 723.
judgment final for appellant, when granted, 714.

[The figures refer to sections.]

RELIEF GIVEN ON APPEAL—Continued.
final judgment for appellant, not granted when it appears that full justice may not have been done, 714.
modification in various forms, 713.
modification requires complete record, 713, 714.
modification by striking out and affirming, 713, 715.
conditional modification, may be made directly or directed, 713.
conditional dismissal, when directed, 713.
modification, is sometimes made directly, and sometimes directed to be made, 713.
in granting, evidence not made basis of order, 715.
functions of trial court not assumed, 715.
order for new trial adds nothing to reversal, 716.
new trial may be limited to particular issues or parties, 716.
court may discriminate between parties as well as issues, 612.
court may reverse, or affirm, as to some, and modify as to others, 712.
court may reverse and direct a new trial as to some, and affirm as to others, 712.
court may order retrial as to some and dismissal as to others, 712.
ordering new trial as part or all of, 711.
reversal of order denying new trial, reverses judgment, 717.

REMITTITUR.
issuance and recall of, 733, 734.
general rules governing issuance of, 733.
issuance of considered with reference to rehearing, 727.
regular issuance of, devests jurisdiction, 733.
recall of, 734.
proper proceedings for recall of, 734.
issuance of, by mistake, or fraudulently, treated as a void act, 734.
inquiry as to regularity of issuance of, not confined to record, 734.
how recall of, with reference to costs obviated, 734.
no technical rule as to who entitled to recall of, 734.
not recalled where no useful purpose thereby served, 734.

REPORTER.
inability of, to transcribe notes as irregularity, 60.

REPORTER'S NOTES.
purpose of statute in requiring to be filed, 431.
mere transcription of, not equivalent of statement or bill, 431, 443.
not to be incorporated in settled statement or bill, 447.

RESTITUTION.
when ordered upon reversal, 720.
See Relief Given on Appeal.

[The figures refer to sections.]

RETRIAL.
in case of defective and incomplete verdict, 254.
See New Trial.

RULES OF COURT.
sanctioning and requiring bills of exception on appeals from orders, 624.
governing oral argument in appellate court, 696.
points and authorities, 697.
the filing of points and authorities, 654.
the printing of transcripts, 634.
preparation, arrangement and uses of transcript, 633.
arrangement of, and index to, transcript, 635.
transcripts, duty of complying with, devolves upon appellant, 642.
filing and service of transcript, and dismissal for failure therein, 642, 651.
cure of defects in transcript, 650.
objections to, and amendment of transcript, 643, 644.
rehearing and hearing in bank, 725, 727.
to what extent may be suspended by stipulation, 709.

SCOPE OF INQUIRY AND RULES OF DECISION ON APPEAL.
considered, 670-695.
cannot be enlarged by statute, 694, 695.
abortive attempts of legislature to limit or enlarge, 694, 695.
discretion where mistake, misapprehension, etc., of jury as affecting, 679.
where no conflict of evidence, 681.
not affected by question whether point argued in lower court, 675.
how far affected by defects in pleadings, 675.
how affected by insufficiency of findings, 675.
where complaint fatally defective and incurable, 675.
special demurrer, grounds for, not reviewed, where none interposed in trial court, 671.
often extensive, in order to discover whether error prejudicial, 678.
where damages alleged to be excessive, 678.
where mistake, misapprehension, etc., of jury, 679.
general view of limitations upon, 670.
may be limited by admissions of counsel, 672.
by theory of case adopted in trial court, 671.
by record, 671, 675.
by sixty-day provision of California statute, 532.
by presumption against error, 685, 686.
by record, as to order on motion for new trial, 671.
by failure to present points in lower court, 671.
to grounds of motion specified in record, 671.
by stipulation or waiver, 672.

[The figures refer to sections.]

SCOPE OF INQUIRY AND RULES OF DECISION ON APPEAL—Continued.
by the briefs or in argument, 672.
none, essentially, by limitation of argument on appeal, 673.
by materiality of points presented, 674.
by consent, 676.
by estoppel, 677.
by conflict of evidence, 678.
by rule against decision of questions of fact, 678.
by rule that court will not investigate as to weight or preponderance of evidence, 678.
where decision and inference from circumstances, 682.
where negligence inferred from circumstances, 682.
by concession to discretion of trial court, 683.
by presumptions in favor of judgment or order appealed from, 684.
by rule that matter complained of must affect a party entitled to appeal, and actually appealing, 688.
with respect to immaterial or nonprejudicial matters, 689.
by rule that facts not decided, exception under rule of "law of the case," 691.
by rule of "law of the case," 697.
by doctrine of stare decisis, 692.
none, by reasoning of lower court, 693.
modifications of general rules, in certain states, 680.
the same in criminal as in civil cases, 742.
distinction as to, in cases of default, judgments, 690.
at hearing of motion, circumscribed by record, 388.
made on statement or bill of exceptions, 389, 393, 432.
limitation of, by grounds specified, 389.
when made upon minutes, 392.
where motion made on affidavits, 390.

SECONDARY EVIDENCE.
what constitutes proper and timely objection to, 274

SERVICE.
of statement or bill, time for, and requisites of, 448.
must be within legal time, 426.
extension of time for, by order of court, 450.
extension of time for, by stipulation, 449.
relief from failure of, by motion, 451.
of notice of appeal, what constitutes, sufficient, 540-542.
of papers on appeal, governed by general rules on subject of, 648, 651.

SHERIFF.
when party, or interested, may not associate with jury, 164.
mistake of, in adjourning court, as irregularity, 61.

[The figures refer to sections.]

SHERIFF—Continued.
disqualification of, to summon, or have charge of jury, proper practice, 95.

SICKNESS.
of juror during trial, as irregularity, 76.

SIGNATURE.
required to notice of intention, 370.
of attorney proposing statement or bill necessary, 432.
proper to notice of appeal, required, 535.
of judge, to judgment, not necessary, 485.

SPECIAL CASES.
or proceedings,
appellate jurisdiction in, 477.

SPECIAL ORDER. See Orders.

SPECIAL PROCEEDINGS.
jurisdiction to grant new trials in, 21.
same rules applicable in, with reference to insufficiency of evidence as in civil actions, 248.

SPECIFICATIONS.
questions of what are sufficient, are legal, 434.
partake of the character of notice, 434.
true office and necessity for, 433.
differentiation with respect to, between statements and bills, 433.
differing provisions as to, with reference to statements and bills of exceptions, 423.
in bills of exceptions, requisites of, 619.
notice containing, cannot be substituted for, 440.
are act of attorney proposing statement or bill, 440.
proper place for, in statement or bill, 440.
sufficiency of, as to amount of recovery on contract, 439.
should be under proper subdivision of the statute providing for new trials, 439.
of errors, when necessary, and requisites of, 435.
need not contain repetition of objections, 435.
pertaining to amendments, 438.
pertaining to instructions, simple form of, 435.
form and requisites of, in statement, 433.
required in statement, though but one point complained of, 433.
none, of errors of law required in bills of exceptions, 619.
necessity for, where insufficiency of evidence relied upon, 423.
of insufficiency of evidence, requisites of, 434.
which merely attack findings, usually insufficient; exceptions, 34.
same rules as to, govern in equity as in legal cases, 434.

[The figures refer to sections.]

SPECIFICATIONS—Continued.
which merely attack judgment or conclusions of law, insufficient, 439.
of mere matters of evidence, insufficient, 434.
should be separate and distinct from specifications of, error, 434.
should be distinct from specification that verdict, or other decision against law, 434.
sufficiency of where there is no evidence, 434.
general sufficient, when, 434.
required, on motion for nonsuit, 346, 347.
degree of particularity of, required upon motion for nonsuit, 348.
when not required in motion for nonsuit, 349.
of grounds, requisites of, in notice of intention, 368.
sufficiency of, in objection to evidence, 276.
in objection to evidence, when none required, 288.
none required, where "verdict or other decisions against law" relied upon for new trial, 437.
of grounds for dismissal of appeal required, 662.
See Notice of Intention; Statements and Bills of Exceptions.

STARE DECISIS.
doctrine of, limited to decisions in same state, 692.
less strongly asserted than formerly, 692.
as applicable to questions of constitutional construction as to other questions, 692.
applies to each point supporting decision, 692.
applicable to decisions only, not to mere dicta, 692.

STATEMENTS.
former and present uses of, 424.
necessity for, as basis of motion for new trial, 424.
similarity in preparation and uses of, to bills of exceptions, 423.
what constitutes diligence, in procuring settlement of, 426.
abandonment of opposition to settlement of, not presumed, 424.
filing of, statutory provisions relating to, 425.
relation of filing of, to engrossment, 425.
filing of before service, still required in some states, 425.
must be served within legal time, 426.
differentiated from bills of exceptions with respect to specifications, 433.
limit scope of inquiry and measure power of court, 424.
constitute record, without which court cannot act, 424.
uses of, on appeal, 424.
prepared after order on motion for new trial on minutes, use of on appeal from judgment, 423, 639.

[The figures refer to sections.]

STATEMENTS AND BILLS OF EXCEPTIONS.
considered, 423-461.
settlement of, constitutes a proceeding, 423.
each step in settlement of constitutes a proceeding, 445.
statutory provisions governing, 423.
statutes relating to proceeding for settlement of, mandatory, 426.
statutory essentials of cannot be dispensed with by stipulation, 431.
slight irregularity in proceeding to settle, unimportant, 423.
preparation and uses of, compared, 613.
methods pursued in settlement of, the same, 423, 613.
general similarity in uses of, 423, 613.
meanings of, assimilated by broadening meaning of term "exception," 423.
differentiated, with respect to specifications, 423, 433.
with respect to power of court to amend after appeal taken, 446.
brevity and conciseness in, commended, 431.
when proper to set forth evidence in, by question and answer, 431.
draft of, should contain request of party proposing for allowance of, 432.
notice of intention not usually any part of, otherwise in Montana, 432, 440, 441.
need not contain papers belonging to judgment-roll, 432.
contain notice of appeal, 432.
recite proceedings to perfect an appeal, 432.
matters which may be omitted from, where appeal from part of order or judgment, 432.
matters which may be omitted from, when new trial granted as to only part of issues, 432.
when should contain order on motion for new trial, 432.
draft of, should contain signature or indorsement of attorney proposing it, 432.
should contain action of court relieving against laches, 448.
must show affirmative ground for new trial or reversal, 427, 428, 429, 430.
incorporation in, of affidavits and exhibits, 460.
proper method of incorporating in, of exhibits and documentary evidence, 447.
setting forth action of court pertaining to amendment in, 438.
specifications in, office and essentials of, 433.
requisites as to specifications of errors in, 435.
error relied upon must be clearly shown in, 428.
should contain evidence upon referred claim against estate, 432.
covering different terms, requirements, as to, 425.
filing of, during term, 425.
when time begins to run against proceeding for settlement of, 426.

[The figures refer to sections.]

STATEMENTS AND BILLS OF EXCEPTIONS—Continued.
service of, how made, 448.
extensions of time for service of, 449, 450.
relief from failure to serve, by motion, 451.
amendments to, provisions and practice governing, 452.
bringing on settlement of, 453.
settlement of, two methods for bringing on, 453.
notice of time and place for settlement of, 453.
authentication of, 442.
authentication of, cannot be dispensed with, 442.
certificate of judge to, requisites of, 442.
requirements as to engrossment of, 447.
essentials of, where excessive damages the ground relied upon, 430.
must clearly show verdict or other decision against law, relied upon for reversal or new trial, 429.
skeleton, uses of, 443, 444.
proceedings before judge or referee at settlement of, 454, 455, 456.
requirements as to notice of settlement of, 453.
effect of appearance and nonappearance of parties at settlement of, 445.
duty of judge in settlement of, 431.
duty of court not merely to sign, but to settle, 443.
extensive powers of courts over settlement, engrossment and amendment of, 445, 446.
settlement of, a duty imposed upon court, 453.
respective duties of counsel with respect to, 427.
relative rights and duties of counsel at settlement of, 456.
objections, excuses and explanations, how made to appear at settlement of statement or bill, 456.
waiver of neglect at settlement of, 455.
practice of striking out for lapse in proceeding to settle, condemned, 456.
discussion and comparison of remedies for refusal of court to settle, 456.
settlement of may be compelled, though no reporter at trial, 457.
mandate to compel settlement of, 457.
manner of settling not directed by mandamus, 457.
effect of statutory changes relating to, 459.
presumption as to use of, on motion for new trial, 423.
presumptions as to, on appeal, 687.
essentials of, for purposes of review, 432.
proper use of, not determined by appellate court, until merits of appeal reached, 684.
limitation of scope of inquiry at hearing of motion by, 389.
connected use of, and affidavits, 461

[The figures refer to sections.]

STATEMENT ON APPEAL.
no longer in general use in California, 423.
on questions of law alone, where appeal from justice's court, 746.
from justices' courts, none required, if trial de novo desired, 747.

STATUS OF PARTIES.
effect upon, of proceedings for new trial, 417-422.
of failure to join in motion for new trial, 420.
at retrial, of granting motion for new trial, 421.

STATUTE OF LIMITATIONS.
amendment to set up, permissible, 113.
upon power to grant new trials, generally found, 19.

STAY BOND.
consideration of, 555-566.
purpose of, collateral to, and independent of, appeal, 555.
distinguished from undertaking on appeal, 556.
purposes of, effected by undertaking, in what cases; statutory provisions considered, 556.
essentials of, where various forms of relief given in same judgment, 564.
upon appeal from order, 557.
given on appeal from order on motion for new trial, stays enforcement of judgment, 557.
time for filing, not limited, 558.
filing of, does not affect proceedings for new trial, 417.
failure to give, leaves lower court without power to stay execution, 560.
giving, does not, as a rule, stay operation of injunction, 561.
giving, stays operation of mandatory injunction, 562.
effect of giving, upon lien of judgment, 565.
upon attachment lien, 566.
special provisions with respect to, where appeal from order dissolving attachment, 558.
in foreclosure suits to stay waste, pending appeal, 563.
relief with respect to, in appellate court, 558.
justification of sureties on, in appellate court, 558.

STIPULATION.
extending time to give notice of intention, 365.
undertaking on appeal may be dispensed with by, 495, 552.
waiving undertaking, should be filed, 637.
transcript may be authenticated by, 636.
amounting to agreed statement, may take place of finding, 604.
extending time for serving statement or bill, 449.
effect of upon power of court, 450.
cannot dispense with statutory essentials of statement or bill, 431.
statement or bill cannot be settled by, except to limited extent, in certain states, 453.

[The figures refer to sections.]

STIPULATION—Continued.
cannot take place of filing statement required by statute, 425.
cannot dispense with authentication of statement or bill, 442.
discretion of court in disposal of motion for new trial cannot be limited by, 397.
appellate jurisdiction cannot be conferred by, 456.
defect of jurisdiction cannot be cured by, 647.
identification of papers used on motion by, insufficient, 626.
judgment entered pursuant to, usually not appealable, 495.
in supreme court, proper subjects for, and by whom should be signed, 708, 709.
scope of review and decision may be limited by, 672.
how far rules of court may be suspended by, 709.
judgment entered, or order made by, not reviewed, 676.
violation of, as ground warranting relief against judgment in equity, 763.

SUBMISSION.
setting aside, to receive further evidence, 267.

SUBSTANTIAL RIGHT.
deprivation of, not distinguishable from deprivation of fair trial, 30.
must be affected, to warrant granting new trial, 29, 428.

SUBSTITUTION.
in appellate court, in case of death of party, 704.
can be none, where appeal taken in wrong name, 704.
none necessary, in case of mere transfer of interests pending appeal, 704.
of attorneys, considered with reference to authority to sign notice of appeal, 535.

SUCCESSION.
of one judge to another, effect of, upon pending motion for new trial, 411.

SUCCESSION IN OFFICE.
does not affect rule as to conflicting evidence on appeal, 678.
pending appeal, substitution of successor not necessary in case of, 706.

SUCCESSION OF INTEREST.
by death, before service of notice of motion for new trial, effect of, 705.
after appeal taken, effect of, 704.
pending appeal, how suggested, 704.

SUPPLEMENTAL COMPLAINT.
proper form for presenting increase of damages arising after filing original complaint, 110.

[The figures refer to sections.]

SUPPLEMENTAL PLEADING.
proper form for presenting facts arising pending action, 110.

SURPLUSAGE.
mere, in verdict no reason for resubmission to jury, 583.
in transcript, will be disregarded, but may hinder review, 645.

TERMS OF COURT.
abolished in California, 26.

THEORY OF CASE.
sometimes important upon question of sufficiency of evidence, 244.
mistaken, constituting accident or surprise, 198.
that followed in trial court may limit review, 671.

TRADING.
between party and juror during trial, as irregularity, 87.

TRANSCRIPT.
discussion of, 633-645.
general purpose of, 633.
preparation, arrangement and uses of, governed by court rules, 633.
compared to petition for writ of error, 638.
what must contain, 638.
must show taking of jurisdictional steps, 638.
must appear by, that papers contained in were filed in lower court, 638.
need not necessarily contain proof of service of notice of appeal; otherwise in certain states, 638, 648.
immaterial omissions from, not regarded, 638.
original complaint may be omitted from, when, 639.
parts of documents should not be omitted from, 639.
shortening by abbreviation, omission and abridgment, 639.
ordered by supreme court; proper practice herein, 639.
certificate of clerk to, not conclusive, 637.
what constitutes sufficient authentication of, 636, 637.
assignment of, and index to, 635.
consequences of nonobservance of court's rule as to arranging and indexing, 635.
separate, required for each appeal, 640.
cannot be pieced out by reference to transcripts on file in other appeals; when rule relaxed, 641.
more than one may be placed under same cover, 640.
deduction of costs, as to unnecessary portion of, 723.
advantages of a printed, 634.
the printed, referred to in rule of court requiring service, 649.
deposit of funds with clerk for printing, requirements as to, 642.
service of printed, sufficient, 642.
copies of, deposited with clerk should correspond exactly with original, 642.

[The figures refer to sections.]

TRANSCRIPT—Continued.
filing and serving, requirements as to, 642.
time for filing, does not begin to run until undertaking filed in lower court, 642.
nonpayment of fees no excuse for delay in filing, 642.
time does not begin to run for filing, until statement or bill of exceptions settled, 642.
objections to, what may be taken and how, 643.
waiver of, 653.
defects in, what fatal, necessitating dismissal, and what remediable, 650.
proceeding to correct and amend, 644.
not amendable by anything newly created, 638.
cannot be amended by affidavits, 644.
document in cannot be pieced out by extrinsic evidence, 644.
time for filing, not extended pending settlement of statement or bill which cannot be used on the appeal, 642.
not extended by pendency of motion to dismiss appeal, 642.
extension of time for filing, to avoid expense of duplication, 659.
time extended one day when last day a holiday, 642.
filing and service of, relief from mistake, excusable neglect, etc., herein, 642.
surplusage in, will be simply disregarded, but may hinder review, 645.
motions to strike out parts of not favored, 710.

TRANSFER OF INTEREST.
as affecting right of party to appeal, 529.
pending appeal, usually no ground for dismissal, 652.
See Succession of Interest.

TREATING JURORS.
as irregularity of adverse party, 83.

TRIAL.
defined, 2, 3.
must be terminated before institution of proceeding for new trial, 2.
absence of, not necessarily fatal to judgment, 38.
irregularity, pertaining to order of, 40.
nonobservance at, of proper order in disposing of issues, as irregularity, 40.
order of, where both equitable and legal issues, 53.
nonobservance at, of proper order of argument of counsel, as irregularity, 41.
right of parties to be present at every stage of, 157.
continuous presence of judge at, necessary, 43.
inability to attend, constituting accident or surprise, 199.
taking up out or order and in violation of understanding constituting surprise, 195.

[The figures refer to sections.]

TRIAL—Continued.
of challenge of juror, by men chosen from the vicinage at common law, 64.
for cause must be by court, 64.
of questions of fact relating to qualifications of jurors, 64.

UNDERTAKING ON APPEAL.
general discussion of, 544-554.
purpose and meaning of, 544.
distinguished from stay bond, 556.
in what cases stay of execution effected by, 556.
dual purpose of, in certain cases, 556.
relation of, to stay bonds, 544.
relation of, to other steps in process of appealing, 532.
filing before service of notice defeats appeal, 546.
form and essential parts of, 549.
each appeal must be mentioned in, 549.
fatal ambiguity in, defeats appeal, 549.
signature of principal to, not necessary, 549.
combination of, with stay bond, 549.
required for each appeal; exception, 548.
one, sufficient where appeals at same time from judgment and order on motion for new trial, 548.
appeal ineffectual without, unless waived, 545, 546.
waiver of, what constitutes, 543.
stipulation dispensing with, 552.
cannot be waived, after lapse of time for filing, 661.
dispensed with by statute, in certain states, 553.
court may dispense with in certain cases, 553.
what constitutes sufficient execution of, 550.
date of execution of, how determined, 550
by surety company, statutes governing, and validity of, 551.
by surety company, proof of agent's authority to sign not required, 551.
same rules of construction applicable to, as to contracts generally, 549.
joint and several character of, 549.
excessive amount of penalty in, does not invalidate, 549.
authentication of signatures to, 550.
deposit in lieu of, 547.
filing, what constitutes, 545, 546.
time for filing, and relation of, to filing and serving notice of appeal, 533, 541, 546.
appellate court cannot dispense with filing of, 554.
extension of time for filing of, 546.
has no effect until filed, 550.
estoppel to deny filing or sufficiency of, 552.
filing new, in appellate court, 554.

[The figures refer to sections.]

UNDERTAKING ON APPEAL—Continued.
if radically defective cannot be remedied in appellate court, 647.
failure of sureties on, to justify, no ground for dismissal, 554.
failure of jury to justify on, no disqualification as such on subsequent, 571.
relief in appellate court from defects and omissions in, 554.
new, necessary, with new sureties, 571.
recital of filing or waiving of, proper in certificate to transcript, 637.
proper practice when clerk in doubt as to sufficiency of form of, 637.
on appeal from justices' courts, requirements as to, 748.
from justices' courts, powers of superior court with respect to, 575, 748.
from justices' courts, effect of failure to provide, 748.

UNDUE INTIMACY.
between party and person summoned on jury, as irregularity of adverse party, 81, 82.
between party and juror, as irregularity of jury, 82.

USURPATION.
of franchise, new trial in action for, 21.

UTAH.
grounds for new trial in, 23, note.

VARIANCE.
as ground for nonsuit, 339-345.
statutory provisions governing, 340.
by proof showing absence of interest in plaintiff, 341.
in actions ex contractu, 342.
by proof contradicting negative allegations, 343.
resulting from nonjoinder, 344.
fatal, not aided by findings, 345.
test of materiality of, 340.
when objection for, at hearing, not available, 388.

VENIRE DE NOVO.
new trial distinguished from, 12.
necessity for, obviated by statute, 12.

VENUE.
motion to change, raises a jurisdictional question, 39.
appealability of order on motion to change, 39.
action of court on motion to change, not proper subject for argument, 90.

VERDICT.
general, and special, distinguished, 580.
whether general, or special, must correspond with and be within issues, 582, 584.

[The figures refer to sections.]

VERDICT—Continued.
general, consists of conclusions of both law and fact, 251.
special, largely gone out of use, 581.
conflicting, where all issues submitted, 581.
effect of general, where only part issues submitted, 581.
inconsistency between general, and special, 581.
comparison with pleadings, as test of sufficiency of, 585.
covering, but more comprehensive than issues, effect of, 582.
statutory changes pertaining to, 579.
effect upon, of irregularity of adverse party, 80.
should dispose of all issues; exception in equity cases, 581.
special, duty of court upon return of, in equity case, 2.
in equity cases, purpose, force and effect of, 582.
not binding upon court, 582.
not decision warranting motion for new trial, 2.
special findings by referee have effect of, 605.
conflict between special, and general conclusion, as ground for new trial, 254.
consisting of evasive answer to questions submitted, as ground for new trial, 254.
in criminal cases, may be set aside when contrary to weight of evidence, 236.
not set aside for only slight excess of damages, 234.
for aggregate sum, when more than one count, as to sufficiency of evidence, 245.
"against law" considered, 254.
"against law," must be clearly so, to warrant new trial, 251.
in disregard of erroneous instructions, as "against law," 254.
which fails to pass upon all issues, distinguished from uncertain, informal and defective, 585.
correction of, by court, 583.
power of court to correct, as to clerical defects and omissions, 584.
uncertain, informal and defective, amendment of, 78, 585.
court has power to direct correction of, 402.
duty of court to correct, 254.
correction of, by jury under court's direction, 254.
when retrial necessary in case of, 254.
irreconcilable inconsistencies in, cannot be cured by court, 584.
mere surplusage in, no reason for resubmission to jury, 583.
of court cannot be substituted for that of jury, 584.
court cannot substitute its opinion for, 231, 402.
court may direct in certain cases, 329.
setting aside, for mistake, inadvertence, etc., of jurors, 409.
waiver of defects and irregularities in, 586.
chance, rule of evidence specially applicable to, 147.
general, irregularity pertaining to, 78.

[The figures refer to sections.]

VERDICT—Continued.
supported only by abandoned theory as irregularity of court, 52.
sealed, right to return purely statutory, 55.
return of, before forbidden separation, no cure of irregularity, 59.
not authorized in criminal case, 154.
return of in criminal case, an irregularity of jury, 78.
as part of record on appeal, 579-586.
not properly part of statement, 579.

VERDICT OR OTHER DECISION AGAINST LAW.
term, explanation of meaning of, 250.
relied upon for reversal or new trial, must be clearly shown, 251, 429.
consisting in failure to follow instructions, 251.
conflict between special and general verdict, 254.
failure to find upon material issue, 253.
may consist in verdict against erroneous instruction, 254.
cannot be predicated upon findings outside issues, 253.
how specified, 250, 437.

VIEW OF PREMISES.
right of party to be present at, 55.

VOIR DIRE EXAMINATION.
of juror, function and importance of, 255, 256.
great latitude of, conceded by courts, 256.

WAIVER.
of conditions contained in order, 405.
of defects in verdicts, 254, 586.
in transcript, what constitutes, 643.
of error, or abuse of discretion, in refusal to continue, 144.
in ruling upon instructions, 331.
in case of postponement of ruling, 289.
by failure to properly object to evidence, 287.
and cure, of error in ruling upon evidence, 301.
in ruling upon motion for nonsuit, 353.
of failure to designate moving papers, 369.
of findings, by failure to appear at trial, 591.
of express findings, when presumed, 590.
of justification of sureties, what amounts to, 572.
of misconduct of jury, by failing to call to attention of court, 149
of neglect, at settlement of statement or bill, 455.
of notice of decision, what constitutes, 363.
of notice of intention, or of the motion, what constitutes, 375.
of objection for failure to swear juror, 42.
that witness not sworn, 42.
to evidence, by not moving to strike out, 298.

[The figures refer to sections.]

WAIVER—Continued.
to amendment bringing in matter proper for supplemental pleading, 110.
to sufficiency of notice of intention, what constitutes, 373.
to settlement of statement or bill, what constitutes, 453.
settlement, how made to appear, 456.
of point in lower court as limitation upon review, 672.
of right to be present at view of premises, 55.
to be present at return of verdict, 55.
to object to improper amendment, 122.
to challenge for implied bias, doctrine of, in state courts, 69.
to challenge, by failure to exercise it, 64.
to complain of disqualification of juror, 71.
to hearing, by accepting settlement prior to, 386.
of right to complain of premature submission of motion, 379.
to nonsuit, by introduction of further evidence, 339.
to have evidence stricken out, by failure to object, 297.
to have review, must clearly appear, 676.
of respondent to ask for dismissal, 660, 661.
of service of statement or bill within legal time, 452.
of surprise, by failure to introduce rebutting evidence, 190.
by failure to amend pleading, 190.
of technical ground for decision on appeal, 672.
of undertaking on appeal, what constitutes, 543.
of undertaking on appeal, by stipulation, 552.
when claimed, must affirmatively appear, 545.
none, after expiration of time for filing, 661.
none, without knowledge, actual or constructive, 73.
none, as a rule, by proceeding for new trial, 422.
none, of filing engrossed statement, 425.
none, of irregularity of court, when, 62.
none, in case of improper line or style of argument, when, 90.
none, as to verdict which fails to support judgment, 586.
none, of defect of appellate jurisdiction, 646, 647.
distinction with respect to, between jurisdictional, and formal, defects, 661.
by proposing amendments, how avoided, 456, 671.
by failure to call irregularity to attention of court, 62.
to object to hearing of motion, 403.
doctrine of, where motion based upon accident or surprise, 190.
how negatived in affidavit charging misconduct of jury, 189.
implication of, case of failure to exhaust peremptory challenges, 73.
can be none, of trial by common-law jury, according to courts of certain states, 69.
how amendments may be proposed, and service admitted without, 453.

[The figures refer to sections.]

WASHINGTON.
grounds for new trial in, 23, note.

WASTE.
stay of, pending appeal, 563.

WEIGHT OF EVIDENCE.
question of, as applied to special verdict, 242.
seldom arises in criminal cases, 239.
when new trial granted for verdict against, 238.
verdict on testimony completely impeached contrary to, 243.

WILL.
probate of, order for proper subject for proceeding for new trial, 21.

WILL CONTEST.
reluctance of court to set aside verdict for insufficiency of evidence in, 246.

WITNESSES.
absence of, as ground for continuance, 133.
abuse of privilege in examining and cross-examining, may warrant reversal, or new trial, 94.
admitted perjury of, usually no ground for new trial, 220.
affidavits merely impeaching, not sufficient as newly discovered evidence, 227.
competency of, when considered where insufficiency alleged, 238.
controlling examination, and limiting cross-examination of, 50.
credibility of, as affecting sufficiency of evidence, 243.
at hearing, entirely for trial court, 406.
at hearing of motion, how far considered, 406.
defendant in criminal case as, proper cross-examination of, 91.
deportment of, as irregularity, 61.
disqualification of jurors as, at hearing of motion, 409.
disappointment in testimony of, as constituting accident or surprise, 191.
duty to call and examine, as constituting due diligence, 210.
duty to find and call, as constituting diligence, 210.
failure of accused to become, not proper subject for comment among jurors, 169.
failure to swear, as irregularity, 42.
forgetfulness of, no ground for new trial, 217.
fully impeached by record, discredited by appellate court, 678.
impeaching party's own, sufficiency of objection, 285.
improper demeanor of court toward, as irregularity, 51.
improper examination and cross-examination of, as irregularity, 94.

[The figures refer to sections.]

WITNESSES—Continued.
incompetency of, must be made specific ground of objection, 277.
instruction touching credibility of, as basis of escrow, 311.
juror as, should testify in open court, 168, 169.
law governing competency of, must be known, 212.
material, absence of, as ground for continuance, 126.
may be called upon trial of challenge of juror, 64.
mistake as to competency of, no ground for new trial, 188.
neglect to interview, as showing lack of diligence, 190.
right to continuance to obtain, waiver of, by accepting admission by opposite party, 143.
tampering with, or keeping from court, as irregularity, 96.
undue criticism of, by court as irregularity, 49.
unexpected failure of, to attend, constituting surprise, 200.
unexpected testimony from party's own, as accident or surprise, 201.
unwilling, compelling to answer, as showing diligence, 190.
when duty of party to examine and cross-examine, 214.

WRIT OF ERROR.
will not lie, where appeal given, 466.

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